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**THE LAW AND CUSTOM**  
**OF THE**  
**CONSTITUTION**  
*ANSON*

**LONDON**  
**HENRY FROWDE, M.A.**  
**PUBLISHER TO THE UNIVERSITY OF OXFORD**



**AND**  
**STEVENS AND SONS, LIMITED**

23

THE  
LAW AND CUSTOM  
OF THE  
CONSTITUTION

BY  
SIR WILLIAM R. ANSON, BART., D.C.L.  
OF THE INNER TEMPLE, BARRISTER-AT-LAW  
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IN TWO VOLUMES  
VOL. I: PARLIAMENT

FOURTH EDITION (1909): REISSUE REVISED (1911)

OXFORD  
AT THE CLARENDON PRESS  
LONDON, NEW YORK AND TORONTO: HENRY FROWDE  
ALSO SOLD BY  
STEVENS & SONS, LIMITED, 119 & 120 CHANCERY LANE, LONDON  
1911

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A622c  
cd4

OXFORD  
PRINTED AT THE CLARENDON PRESS  
BY HORACE HART, M.A.  
PRINTER TO THE UNIVERSITY

MAY 25 1922

## PREFACE

### TO THE FOURTH EDITION OF PARLIAMENT AND THE THIRD EDITION OF THE CROWN

THESE volumes, in the edition which I am now able to complete, are intended to remain what they originally purported to be—an introduction to the study of the Constitution. They were, in particular, designed for the assistance of students in the Oxford School of Jurisprudence; and this will explain the insertion of chapters more interesting perhaps to the Oxford student than to the general reader, chapters dealing with the relation of constitutional law to other branches of legal study, and with the history of the development of Parliament and the definition of Prerogative.

I have sometimes found it difficult to write on the topics to which the remaining and larger part of the books is devoted, with sufficient fullness to convey a definite impression of their place in the general scheme of Government, yet not on such a scale as would destroy the proportions of my plan or would suggest that I am giving information which is more properly sought for in special treatises.

Hence perhaps the reader may ask why, on some of these subjects, I have said so much; or why, having said so much, I have said no more. If I have induced him to seek for fuller knowledge I shall not have written in vain.

Since these books were first written large additions have been made to the literature of the subject, especially to political history, which tells us so much of constitutional convention. The Letters of Queen Victoria present a picture, which one might vainly try to put together from



contemporary documents, of the relations of the Crown and its ministers in the middle of the nineteenth century. The biographies of Mr. Gladstone, of Lord Granville, of Sir James Graham, the autobiography of the Duke of Argyll, and the account by Sir R. Biddulph of Lord Cardwell's work at the War Office, reveal to us much of the inner life of politics during the last seventy or eighty years, of the working of the Cabinet system, and the action of Government departments.

For some important contributions to this branch of study we must look outside our own country, to Mr. Porritt's exhaustive history of the unreformed House of Commons, and to Mr. Lowell's admirable treatise on the Government of England, and, in particular, to his account of party organization in parliamentary and municipal life. Dr. Redlich has supplied us with books which should long ago have been produced at home : a history and exposition of our system of Local Government, and of the Procedure of the House of Commons. It is not too much to say that a knowledge of these works is essential to the student of either subject, and I desire most gladly and fully to acknowledge the debt which I owe to both.

Sir Francis Palmer, in his *Peerage Law in England*, has set out the existing law, as Mr. Pike has dealt with the antiquities, of the Peerage. Mr. Low's *Governance of England* gives us a description of the actual working of the constitution which forms a fitting sequel to Bagehot's suggestive treatise, and makes us realize how great a change has been wrought in the conditions of political life between the death of Lord Palmerston and the accession to office of Sir Henry Campbell-Bannerman.

With all this wealth of material for the study of the past and the critical analysis of the present, it must yet be doubted whether any one who tries to describe the constitution of to-day can fail to be impressed with a sense of the passing and ephemeral character of nearly everything

that is to be said and written on the subject, and with the instability of things as they are. For while in their broad outlines our institutions have remained unaltered since the reforms of 1885, we cannot fail to see that a change has come over their working which sooner or later may call for some change in their structure.

Our representative system unduly narrows the choice of the electors, it tends to confer increasing power on the controllers of the machinery of party organization, and, in the result, it produces violent fluctuations in the balance of parties in successive Parliaments.

The procedure of the House of Commons has been modified, first to check deliberate obstruction, then to deal with mere congestion of business and superfluity of talk, until the limitations imposed on discussion, combined with the strict party organization which makes the result of discussion a foregone conclusion, have destroyed much of the interest and instructive character which formerly attached to the debates in the House.

The relations of the two Houses are treated by one of the great parties in the state as a serious, if not a dominant, political issue. A Committee of the House of Lords, appointed to consider means for increasing the efficiency of the House, has made some important suggestions for change in its composition. The House of Commons, on the other hand, has passed a resolution in favour of legislation which would enable that House to overrule the dissent of the House of Lords without an appeal to the electors.

If we are to contemplate the transfer of legislative sovereignty to a single chamber wherein the time of one Parliament would probably be engaged in undoing the work of its predecessor, under conditions of discussion limited, as at present, by the guillotine, we should have departed a long way from the constitutional ideals of the nineteenth century.

We are a practical people and there may be no real danger of such a development; but, just because we are so practical as to be unwilling ever to look far ahead, we need to recollect that constitutional changes often move imperceptibly and come upon us faster than we are aware. It may be well therefore to note the tendencies of the present day.

It remains to thank the many friends who have helped me with information and advice in the re-editing of these volumes. In particular I have to acknowledge much kind help from Mr. FitzRoy, who has enabled me to study the Registers of the Privy Council: at the Foreign Office and the Colonial Office I have received welcome aid from Sir E. Davidson and Mr. H. B. Cox in dealing with the troublesome subjects of Foreign Jurisdiction, the position of Protectorates, and the treaty-making powers of the Crown: and Mr. A. G. Liddell has helped me, as in former editions, in matters concerning the business of the Crown Office and the uses of the Great Seal. In matters of Parliamentary procedure Sir Courtenay Ilbert has allowed me constantly to refer to him. Finally I must acknowledge gratefully the assistance rendered by my friend, Mr. Brierly of All Souls College, who has read the proof sheets of the volume on Parliament, and supplied me with much useful suggestion and correction.

WILLIAM R. ANSON.

ALL SOULS COLLEGE, OXFORD,  
*May, 1909.*

## PREFACE TO THE FIRST EDITION

I HAVE endeavoured in this book to state the law relating to existing institutions, with so much of history as is necessary to explain how they have come to be what they are. The student of constitutional law realizes at every turn the truth of Dr. Stubbs' saying, that 'the roots of the present lie deep in the past.' Nevertheless a writer who wishes to describe our present constitution and its relations to the past, finds himself involved in difficulty, if he begins at the beginning. It is impossible to keep our institutions abreast along the course of history, from the Witenagemot to the Redistribution Act, without putting a severe strain upon the attention of the reader, and probably, in the end, sacrificing law to history, the present to the past. The lawyer primarily wants to know what an institution is, and then, the circumstances of its growth. I have tried to satisfy his first requirement, and, as to his second, to put him in the way of obtaining more knowledge than I can pretend to possess.

Nor, again, have I attempted to delineate the law of our constitution after the manner of Professor Dicey. He has drawn with unerring hand those features which distinguish our constitution from others, and has given us a picture which can hardly fail to impress itself on the mind with a sense of reality. I have tried to map out a portion of its surface and to fill in the details. He has done the work of an artist. I have tried to do the work of a surveyor.

I have dealt, in this volume, solely with Parliament, and hope in a subsequent volume to deal with the Executive.

Writing for students, I have treated some matters more fully and others less fully than the practical lawyer may think necessary; but where I have been brief I do not pretend to have written with a reserve of knowledge, and I have often said no more because I had no more to say.

W. R. A.

ALL SOULS COLLEGE,  
*March, 1886.*

## NOTE

THE changes rendered necessary by the Parliament Act have been made in such a way as to bring this book up to date until a new edition is required, and have been introduced with as little disturbance as possible to the existing text.

I have indicated on a page opposite to the commencement of the Introduction the places in which alterations have been made; and for the convenience of the reader the Parliament Act has been printed in full.

W. R. A.

ALL SOULS COLLEGE,  
*October, 1911.*

## NOTE

JANUARY, 1912.

page 288*b*, line 23.

The words

‘to secure that effect  
shall be given to the desire of the Government.’

are taken from the Official Report of the Debates in the House of Commons on 7th August, 1911. This report was issued on the morning following the debate; but in the bound volume of the Parliamentary Debates, p. 811 (the 9th vol. of 1911 and the 29th of the 5th series) the sentence is altered so as to run

‘to secure that effect  
shall be given to the decision of the country.’

This has been ascertained to be the correct version of the Cabinet Minute laid before the King on the 15th November, 1910, and read by Mr. Asquith in the House of Commons on the 7th August, 1911.

The bound volume was issued some weeks after the official report from which the sentence in the text is quoted.

*Anson, Parliament*

*face p. x*



# TABLE OF CONTENTS

## INTRODUCTION

	PAGE
The constitution is of gradual growth . . . . .	1
Sovereignty in our constitution . . . . .	1
Theory of indivisibility of sovereignty . . . . .	2
Executive and legislature are really distinct powers . . . . .	3
Divergence of theory and practice . . . . .	4
In legislation . . . . .	5
In administration . . . . .	5
✓ The constitution is unwritten . . . . .	6
Consequent liability to change . . . . .	7
Parliament omnipotent to change . . . . .	7
But cannot bind its successors . . . . .	8
Use and custom effect change . . . . .	9
Illustrated by growth of the Cabinet . . . . .	9
By rules of procedure . . . . .	9
Incidental results . . . . .	11

## CHAPTER I

### PLACE OF CONSTITUTIONAL LAW IN JURISPRUDENCE

Constitutional law is a branch of Public law . . . . .	14
Necessity of inquiry into structure of State . . . . .	14
The beginnings of State control . . . . .	16
The strength of the State the foundation of Jurisprudence . . . . .	19
The complexity of the State makes the difficulty of constitutional law . . . . .	21
Topics akin to constitutional law, but which need to be distinguished . . . . .	22

## CHAPTER II

### HISTORICAL OUTLINE

The Saxon constitution . . . . .	25
The Norman administration . . . . .	26



	PAGE
The constitution of Edward I . . . . .	28
The growth of political power of Commons . . . . .	29
"    "    "    in relation to the executive . . . . .	30
"    "    "    "    "    "    legislation . . . . .	31
The feudal king . . . . .	32
The Reformation and the Tudor monarchy . . . . .	33
The Stuarts and Parliament . . . . .	34
Crown and Parliament, 1660-1688 . . . . .	36
✓ The modern constitution . . . . .	37
Cabinet and party government . . . . .	40
The United Kingdom and the Empire . . . . .	43

## CHAPTER III

### THE MEETING OF PARLIAMENT

Outline of subject . . . . .	45
Parties to legislation . . . . .	46
Who are summoned to Parliament . . . . .	47
Early deliberative assemblies . . . . .	47
The Model Parliament . . . . .	49
Non-attendance of clergy . . . . .	50
Modern traces of mediaeval constitution of Parliament . . . . .	50
Objects of summons . . . . .	51
Mediaeval . . . . .	51
Modern . . . . .	52
Forms of summons . . . . .	53
Proclamation for dissolving one Parliament and calling another . . . . .	53
Writ of summons to temporal peer . . . . .	55
"    "    spiritual peer . . . . .	56
Writ of attendance to judge and law officer . . . . .	57
Modern writ for return of member of the House of Commons . . . . .	57
Writ before 1872 . . . . .	59
Opening of Parliament.	
Ceremonial, and election of Speaker . . . . .	61
Evidence of membership . . . . .	62
The oath . . . . .	63
The speech from the Throne . . . . .	65
Form of opening Parliament from Lords' and Commons' Journals of 1880 . . . . .	65
Adjournment, prorogation, dissolution . . . . .	70
Adjournment the act of each House . . . . .	70
Prorogation the act of the Crown . . . . .	71
Postponement and acceleration of meeting . . . . .	71
Dissolution by prerogative . . . . .	72
By efflux of time . . . . .	72
By demise of Crown . . . . .	73
Legal authority for the rules described . . . . .	75

## CHAPTER IV

## THE HOUSE OF COMMONS

	PAGE
<b>1. Who may be chosen . . . . .</b>	<b>78</b>
<i>Disqualifications :</i>	
Infancy . . . . .	78
Unsoundness of mind . . . . .	78
Alienage . . . . .	80
Peerage . . . . .	81
Clergy . . . . .	81
Office . . . . .	82
Pensions . . . . .	87
Government contract . . . . .	87
Conviction of treason or felony . . . . .	87
Bankruptcy . . . . .	88
Corrupt practices . . . . .	89
<i>Extinct disqualifications . . . . .</i>	<i>89</i>
Incapacity to take the oath . . . . .	89
Persons thus disqualified . . . . .	90
Non-residence . . . . .	94
Property . . . . .	94
Profession of the law . . . . .	94
Resignation of seat impossible . . . . .	94
Effected by taking Stewardship of royal manor . . . . .	95
Form of appointment . . . . .	96
Note (1) as to official disqualifications . . . . .	97
„ (2) as to Parliamentary oath . . . . .	100
<b>2. Who may choose . . . . .</b>	<b>101</b>
Process of a mediæval election . . . . .	102
The modern franchise . . . . .	104
<i>English County franchise before 1884.</i>	
At common law . . . . .	105
Effect of 8 Hen. VI. c. 7 . . . . .	105
„ of Reform Act, 1832 . . . . .	106
„ of Representation of the People Act, 1867 . . . . .	106
<i>English Borough franchise before 1884.</i>	
Forms of qualification . . . . .	107
Causes of complexity . . . . .	109
Effect of Reform Act, 1832 . . . . .	112
„ of Representation of the People Act, 1867 . . . . .	113
<i>Scotch franchise before 1884.</i>	
Qualifications in counties and towns . . . . .	114
<i>Irish franchise before 1884.</i>	
Qualifications in counties and towns . . . . .	115
<i>The Representation of the People Act, 1884.</i>	
Its effect in producing uniformity . . . . .	116

	PAGE
Present qualification arising from Property . . . . .	117
"       "       "       Occupation . . . . .	118
"       "       "       Residence— . . . . .	120
The householder . . . . .	120
The lodger . . . . .	121
<i>Incapacities and disqualifications.</i>	
Incapacity arising from sex . . . . .	123
"       "       infancy . . . . .	124
"       "       peerage . . . . .	124
"       "       office or employment . . . . .	125
"       "       alienage . . . . .	126
"       "       unsoundness of mind . . . . .	126
"       "       conviction of treason, felony, or corrupt practices . . . . .	126
"       "       receipt of parochial relief . . . . .	126
"       "       rules as to fagot votes . . . . .	127
"       "       "       as to joint occupiers . . . . .	128
3. How they may choose . . . . .	128
<i>Distribution of Seats</i>	
Changes in county representation before 1832 . . . . .	129
"       borough representation before 1832 . . . . .	129
Effect of Reforms of 1832 and 1867 . . . . .	130
"       Redistribution Act, 1885 . . . . .	132
✓ Single-member constituencies . . . . .	133
<i>Registration.</i>	
Duties of Clerk of the Peace . . . . .	134
"       Overseer . . . . .	135
"       Revising Barrister . . . . .	136
The register, how far conclusive . . . . .	136
<i>Mode of Election.</i>	
Procedure before the Ballot Act . . . . .	137
Present procedure, the nomination . . . . .	138
The poll . . . . .	138
The return . . . . .	139
<i>Representation of minorities.</i>	
Fancy franchises . . . . .	141
The plural vote . . . . .	141
Three-cornered constituencies . . . . .	141
University representation . . . . .	141
The cumulative vote . . . . .	142
Self-made constituencies . . . . .	142
Proportional representation . . . . .	143
Defects of present system . . . . .	144
4. Privileges of the House of Commons.	
Outline of the subject . . . . .	145
1. <i>Officers of the House and Procedure for contempt.</i>	
The Speaker . . . . .	147
The Chairman of Committees . . . . .	149

	PAGE
The Clerk of the House . . . . .	151
The Serjeant at Arms . . . . .	151
Procedure for contempt . . . . .	151
2. <i>Privileges demanded by the Speaker.</i>	
History of the claim . . . . .	153
Formal privileges . . . . .	153
Freedom from arrest . . . . .	154
Freedom of speech . . . . .	157
Its limits . . . . .	160
Its consequences.	
The right to exclude strangers . . . . .	161
To forbid publication of debates . . . . .	162
Reporting in 17th and 18th centuries . . . . .	163
Reporting still on sufferance . . . . .	164
Limits of right to publish . . . . .	165
3. <i>Privileges of the House not demanded by the Speaker.</i>	
Right to provide for its proper constitution . . . . .	167
By order of new writs to fill vacancies . . . . .	167
By trial of disputed returns . . . . .	168
The case of <i>Fortescue and Goodwin</i> . . . . .	169
The Grenville and Parliamentary Elections Acts . . . . .	171
By noting qualifications . . . . .	172
By expulsion of unfit persons . . . . .	172
Right to exclusive cognizance of matters arising in the	
House . . . . .	174
Illustrated by case of <i>Bradlaugh v. Gossett</i> . . . . .	175
Limits of the right . . . . .	175
Power to inflict punishments to enforce privilege . . . . .	177
Admonition—reprimand—commitment . . . . .	177
Fine—expulsion . . . . .	178
The right of commitment . . . . .	178
4. <i>Limitation of Privilege by Courts of Law.</i>	
Claims of the House to determine its privileges . . . . .	181
The case of <i>Ashby v. White</i> . . . . .	181
,, ,, <i>Stockdale v. Hansard</i> . . . . .	183
The true nature of Privilege.— <i>Bradlaugh v. Gossett</i> . . . . .	186
The cause of commitment need not appear . . . . .	187
<i>Burdett v. Abbott</i> . . . . .	188
But if it does the Courts will consider its adequacy . . . . .	188

## CHAPTER V

### THE HOUSE OF LORDS

Outline of the subject . . . . .	190
1. <i>The Baronage as an estate of the realm.</i>	
The Great Council and the Norman baronage . . . . .	192
The majores barones of the Charter . . . . .	193

	PAGE
The baronage of Edward I . . . . .	193
Rested upon tenure and summons . . . . .	194
The hereditary right to summons . . . . .	196
2. <i>Difficulties in determining estate of Baronage.</i>	
From mode of creation . . . . .	196
From connection with tenure . . . . .	197
Gradual settlement of disputed questions . . . . .	198
3. <i>Real or supposed restrictions on creation.</i>	
In the case of the Scotch peers . . . . .	201
" " Irish peers . . . . .	201
Common Law restrictions on . . . . .	201
Regrant of surrendered peerage . . . . .	
Permissible limitations of descent . . . . .	202
Baronies by tenure.—The <i>Berkley</i> peerage case . . . . .	204
The Peerage bill of 1719 . . . . .	207
4. <i>Restrictions on summons.</i>	
The case of baronies by tenure . . . . .	208
" " of Scotch and Irish peers . . . . .	209
" " of Spiritual peers . . . . .	210
Descendibility and life peerages . . . . .	210
The case of life peerages.—The <i>Wensleydale</i> case . . . . .	212
The case of aliens and bankrupts . . . . .	215
5. <i>Disqualifications for sitting and voting.</i>	
Infancy . . . . .	215
Felony. Sentence of the House . . . . .	216
Failure to take the oath or to affirm . . . . .	217
6. <i>Mode of acquiring the right to sit and vote.</i>	
Peers of the United Kingdom . . . . .	217
Representative peers of Scotland . . . . .	219
Representative peers of Ireland . . . . .	221
Spiritual peers . . . . .	222
Conflicting views as to rights of Spiritual peer . . . . .	225
Lords of Appeal . . . . .	227
Introduction of peers . . . . .	228
Their rank and precedence . . . . .	229
7. <i>Privileges of the House.</i>	
The Speaker of the House of Lords . . . . .	230
Freedom of the person, of speech, and of access to the Crown . . . . .	231
Right to exclude disqualified persons . . . . .	231
" to commit . . . . .	232
Proxies and protests . . . . .	232
Judicial duties . . . . .	233
Trial of peers . . . . .	233
Right to insist on summons of qualified persons . . . . .	234
" to determine disputed claims . . . . .	235
Report on suggestions for increasing efficiency of House . . . . .	237

# CHAPTER VI

## THE PROCESS OF LEGISLATION

	PAGE
Outline of the subject . . . . .	240
<b>1. History of legislative procedure.</b>	
Rights of Commons in respect of taxation . . . . .	242
" " " " legislation . . . . .	242
Conflicting claims of the Crown . . . . .	243
Statute and Ordinance . . . . .	243
Claim of Crown to legislate by Ordinance . . . . .	244
Doubtful points as to early procedure . . . . .	245
Legislation upon petition . . . . .	247
Uncertainty arising from it. . . . .	248
The Commons begin to draft bills . . . . .	249
Increased power of Parliament . . . . .	250
The Houses frame the laws . . . . .	250
The King assents or dissents . . . . .	250
Commencement of modern procedure . . . . .	251
Course of a bill in the Commons. . . . .	251
The three readings of a bill . . . . .	251
Early rules of procedure and their object . . . . .	252
Compared with modern difficulties . . . . .	253
<b>2. Ordinary procedure of the Houses. Public Bills.</b>	
Business of each day . . . . .	254
The Speaker in the chair . . . . .	254
Hours of sitting . . . . .	254
Private business. Questions . . . . .	255
Adjournment of House. Public petitions . . . . .	256
Notices of motion. Motions for leave of absence . . . . .	257
Notices of motion and Orders of the day . . . . .	258
Modes of introducing a bill. . . . .	258
A public bill in the Commons . . . . .	259
First and second readings . . . . .	259
Committee and Report stages . . . . .	260
Limitations on debate . . . . .	262
The closure : its history and practice . . . . .	263
Closure by compartments or guillotine . . . . .	263
Need for limitations on debate . . . . .	265
Effects of closure and guillotine in debate . . . . .	266
On power of executive. . . . .	267
<b>3. Money Bills.</b>	
The Commons have exclusive control over them . . . . .	268
Money is only granted on request of the Crown . . . . .	270
And in Committee of the House . . . . .	273
Committees of Supply and of Ways and Means . . . . .	273
Committee of Ways and Means . . . . .	276
Appropriation Bill . . . . .	278

	PAGE
<b>4. The Procedure in the House of Lords and the Relations of the Houses.</b>	
A bill in the Lords . . . . .	281
Mode of settling disagreement between the Houses . . . . .	282
Conference and message . . . . .	282
The Houses in conflict . . . . .	283
Dissolution : creation of peers . . . . .	283
Modern conventions . . . . .	284
Modern difficulties and their proposed solution . . . . .	288
<b>5. Private Bill Legislation.</b>	
Historical outline . . . . .	291
Character of procedure . . . . .	293
The bill in the House . . . . .	294
The bill in Committee . . . . .	295
<b>6. Provisional and other Statutory Orders and Rules.</b>	
Provisional Orders . . . . .	297
Statutory Rules and Orders . . . . .	298

## CHAPTER VII

### THE CROWN IN PARLIAMENT

<b>The Crown as constituting Parliament . . . . .</b>	<b>301</b>
Statutory security for annual sessions . . . . .	302
Practical securities . . . . .	303
The prerogative of Dissolution . . . . .	304
The right of Ministers to claim a dissolution . . . . .	305
Conditions of its exercise . . . . .	306
The King retains the prerogative . . . . .	308
<b>The Crown in communication with Parliament.</b>	
The speech from the Throne . . . . .	309
The Royal presence in the Lords . . . . .	309
In the Commons . . . . .	310
Royal messages . . . . .	311
Use of Sovereign's name in debate . . . . .	312
<b>The Crown as a party to legislation . . . . .</b>	<b>313</b>
The Royal assent, in person or by Commission . . . . .	313
To a public bill. The veto . . . . .	315
To a private bill . . . . .	316
To a money bill . . . . .	316

CHAPTER VIII

THE EXECUTIVE AND LEGISLATURE IN CONFLICT

	PAGE
Outline of the subject . . . . .	320
<i>Claims of the Crown to independent legislative powers.</i>	
The Ordinance and the Proclamation . . . . .	321
The Statute of Proclamations . . . . .	321
Use of Proclamations by Tudors and Stuarts . . . . .	322
Opinions of the judges on their validity . . . . .	323
Illustrations of legal and illegal Proclamations . . . . .	324
<i>Interference by the Crown with the operation of law.</i>	
The dispensing power, its use and abuse . . . . .	326
Illustration of its use. <i>Thomas v. Sorrell</i> . . . . .	327
Illustration of its abuse. <i>Goddan v. Hales</i> . . . . .	328
The suspending power . . . . .	331
The Declaration of Indulgence and the Seven Bishops . . . . .	331
<i>Taxation.</i>	
The forms of the difficulty between Crown and Parliament . . . . .	334
Indirect taxation : the case of <i>Bate</i> . . . . .	335
The Commons protest against Impositions . . . . .	336
Substance of Hakewill's speech for the protest . . . . .	336
✓ Direct taxation : the case of <i>Hampden</i> . . . . .	339
Exaction of shipmoney, and proceedings thereon . . . . .	339
Arguments of Hampden's counsel . . . . .	340
Statutory settlement of the question . . . . .	341
<i>Influence of the Executive on the legislature.</i>	
Modes of its exercise . . . . .	342
Creation of boroughs . . . . .	343
Interference with elections . . . . .	344
Policy of the first Stuarts . . . . .	345
Parliamentary management after the Restoration . . . . .	346
And during the eighteenth century . . . . .	347
Modes of influencing members . . . . .	349
Offices : pensions . . . . .	349
Government contracts . . . . .	350
Shares in loans : payment for votes . . . . .	350
Honours and dignities . . . . .	353
Purchase or corruption of constituencies . . . . .	353
Influence of the Crown upon the Lords . . . . .	354
By expression of opinion . . . . .	355
By creation of peers . . . . .	356

CHAPTER IX

THE HIGH COURT OF PARLIAMENT

Parliament not solely concerned with legislation . . . . .	358
Its direct and indirect judicial powers . . . . .	359
Original jurisdiction claimed by the Lords . . . . .	359



	PAGE
And by the Commons . . . . .	360
Actual jurisdictions exercised . . . . .	361
(1) Impeachment . . . . .	362
Procedure in case of impeachment . . . . .	363
Points of controversy . . . . .	364
(2) Appellate jurisdiction of the House of Lords . . . . .	366
(3) The right of petitioning . . . . .	369
Ancient forms of its exercise . . . . .	369
Petitions resulting in private bills . . . . .	371
Public petitions . . . . .	371
Rules as to making and receiving them . . . . .	372
(4) Committees of inquiry . . . . .	376
Conditions under which they are desirable . . . . .	377
(5) Address for removal of servants of the Crown . . . . .	378
Procedure in such cases . . . . .	379
(6) Parliament and the Ministers of the Crown . . . . .	380
Nature of control exercised by Parliament . . . . .	381
Parliament and party government . . . . .	384

# INDEX OF CASES

	PAGE
<i>Ashby v. White</i> , 1 Sm. L. C. (ed. 11) 263 . . . . .	182, 185
<i>Atkinson v. Collard</i> , 16 Q. B. D. 254 . . . . .	120
<i>Attorney-General v. Bradlaugh</i> , 15 Q. B. D. 101 . . . . .	92
<i>Bate's case</i> , 2 State Trials, 371 . . . . .	335
<i>Beauchamp (Earl of) v. Overseers of Madresfield</i> , L. R. 8 C. P. 252 . . . . .	125
<i>Berkeley peerage case</i> , 8 H. L. C. 79 . . . . .	200, 204
<i>Bradlaugh v. Gosset</i> , 12 Q. B. D. 281 . . . . .	92, 175, 186
<i>Bradley v. Baylis</i> , 8 Q. B. D. 219 . . . . .	113, 120
<i>Buckhurst peerage case</i> (1876), App. Ca. 2. 1 . . . . .	200, 203, 204
<i>Burdett v. Abbott</i> , 14 East, 128 . . . . .	176, 180, 188, 189
<i>Carter v. Tanner</i> , 16 Q. B. D. 231 . . . . .	120
<i>Chorlton v. Lings</i> , L. R. 4 C. P. 374 . . . . .	124
<i>Chorlton v. Stratford</i> , L. R. 7 C. P. 201 . . . . .	118
<i>Clarke v. Bradlaugh</i> , 7 Q. B. D. 38 . . . . .	91, 92
<i>Clifton peerage case</i> , Collins' Baronies, 301 . . . . .	199, 211
<i>Combe v. Delabere</i> , 22 Ch. D. 333 . . . . .	301
<i>Coven v. Town Clerk of Kingston-upon-Hull</i> (1897), 1 Q. B. 273 . . . . .	127
<i>De l'Isle peerage case</i> , Nicolas' Report . . . . .	195
<i>Devon peerage case</i> , 2 Dow & Ch. 200 . . . . .	202
<i>Duncombe's case</i> , 1 Exch. 430 . . . . .	156
<i>Eliot's case</i> , 3 State Trials, 294 . . . . .	159, 176
<i>Eton College, case of</i> , Williams' Report . . . . .	331
<i>Fielding v. Thomas</i> (1896), App. Ca. 612 . . . . .	181, 188
<i>Fitzwalter peerage case</i> , Collins' Baronies, 287 . . . . .	207
<i>Freschville peerage case</i> , Lords' Report, iii. 29 ; Lords' Journals, xiii. 174 . . . . .	199
<i>Godden v. Hales</i> , 2 Shower, 275 . . . . .	328
<i>Harrison v. Carter</i> , 2 C. P. D. 26 . . . . .	126, 127
<i>Hennessy's case</i> , Hansard, 3rd Series, clvi, 1931, 2213 . . . . .	257
<i>Howard v. Gosset</i> , 10 Q. B. 451 . . . . .	152, 189
<i>Jones v. Randall</i> , 1 Cowp. 17 . . . . .	180
<i>Lake v. King</i> , 1 Saund. 131 . . . . .	165
<i>Miller v. Salomons</i> , 7 Exch. 475 . . . . .	} 91
" " 8 " 778 . . . . .	
<i>Mitchell's case</i> , 9 Irish L. R. C. L. 217 . . . . .	87
<i>Murray's case</i> , 2 Wils. 299 . . . . .	187
<i>Nairn v. University of St. Andrews</i> (1909), A. C. 147 . . . . .	124
<i>Norfolk peerage case</i> (1907), A. C. 10 . . . . .	200, 202
<i>Oxford peerage case</i> , Collins' Baronies, 190 . . . . .	201
<i>Paty's case</i> , 2 Lord Raymond, 1105 . . . . .	187
<i>Proclamation, case of</i> , 12 Co. Rep. 74 . . . . .	323
<i>Purbeck peerage case</i> , Collins' Baronies, 293 . . . . .	199, 201
<i>Reg. v. Archbishop of Canterbury</i> , 11 Q. B. 483 . . . . .	224

	PAGE
<i>Ree v. Creevy</i> , 1 M. & S. 278 . . . . .	165
<i>Ree v. Flower</i> , 8 Durnf. & East, 314 . . . . .	232
<i>Ruthyn peerage case</i> , Collins' Baronies, 256 . . . . .	199, 201
<i>Seven Bishops' case</i> , 12 State Trials, 371 . . . . .	332
<i>Sheriff of Middlesex's case</i> , 11 Ad. & E. 809 . . . . .	188
<i>Shirley v. Fagg</i> (1675), State Trials, vol. vi, p. 1122 . . . . .	368
<i>Shipmoney, case of</i> , 3 State Trials, 825 . . . . .	339
<i>Skinner v. East India Company</i> . . . . .	359
<i>Smith O'Brien's case</i> , Hansard, 3rd Series, lxxv. 1291 . . . . .	257
<i>Stockdale v. Hansard</i> , 9 A. & E. . . . .	166, 183, 185, 186, 232
<i>Stowe v. Jolliffe</i> , L. R. 9 C. P. 734 . . . . .	137
<i>Tanner v. Carter</i> , 16 Q. B. D. 231 . . . . .	120
<i>Thetford, borough of</i> , 4 Douglas, 87 . . . . .	82
<i>Thomas v. Sorrell</i> , Vaughan, 330 . . . . .	327
<i>Wason v. Walter</i> , L. R. 4 Q. B. 89 . . . . .	167
<i>Wensleydale peerage case</i> , Hansard, cxl. 330 . . . . .	200, 212, 234
<i>Willoughby peerage case</i> , Collins' Baronies, 11 . . . . .	198
<i>Wiltes peerage case</i> , L. R. 4 H. L. 126 . . . . .	202, 235

# INDEX OF STATUTES

	PAGE
Magna Charta ... ..	27, 47, 156
Confirmatio Cartarum ... ..	31, 242, 340
De Tallagio non Concedendo ... ..	340
15 Ed. II. ... ..	Legislative power of Commons... 50, 243
19 Ed. II. ... ..	Land Tenure... .. 195
2 Ed. III. c. 9 ... ..	Impositions ... .. 337
4 Ed. III. c. 14 ... ..	Annual sessions of Parliament ... .. 202
14 Ed. III. st. 1, c. 21 ... ..	Customs on wool ... .. 244, 335, 337
. . . . st. 2, c. 4 ... ..	Customs on wool ... .. 335
27 Ed. III. c. 7 ... ..	Dispensations ... .. 337
36 Ed. III. c. 11 ... ..	Dispensations ... .. 337
45 Ed. III. c. 4 ... ..	Customs on wool ... .. 335
5 Ric. II. c. 4 ... ..	Writ of summons ... .. 196
13 Ric. II. c. 1 ... ..	Charters of pardon ... .. 326
1 Hen. IV. c. 14 ... ..	Appeals in Parliament ... .. 362, 367
7 Hen. IV. c. 15 ... ..	Return of writs ... .. 102, 105, 107
. . . . c. 16 ... ..	Procedure at elections ... .. 61
1 Hen. V. c. 1 ... ..	Residence in constituency ... 94, 104, 344
8 Hen. VI. c. 7 ... ..	Qualification for county franchise ... 105, 117
20 Hen. VI. c. 9 ... ..	Privilege. Trial of peeresses ... .. 233
23 Hen. VI. c. 15 ... ..	Procedure at elections ... .. 61, 103, 107
4 Hen. VIII. c. 8 ... ..	Privilege. Freedom of speech ... .. 158
6 Hen. VIII. c. 9 ... ..	Leave of absence for members ... .. 179, 257
. . . . c. 16 ... ..	Leave of absence ... .. 179
25 Hen. VIII. c. 20 ... ..	Appointment of bishops ... .. 223, 224
27 Hen. VIII. c. 26 ... ..	Representation of Welsh counties ... .. 134
31 Hen. VIII. c. 8 ... ..	Proclamations ... .. 321
. . . . c. 10 ... ..	Precedence of peers ... .. 229
33 Hen. VIII. c. 21 ... ..	Royal assent by commission ... .. 314
35 Hen. VIII. c. 11 ... ..	Wages of members ... .. 129
1 Ed. VI. c. 12 ... ..	Repeal of Statute of Proclamations... .. 322
5 Eliz. c. 1 ... ..	Oath of supremacy ... .. 63, 89
1 Jac. I. c. 13 ... ..	Privilege. Freedom from arrest ... .. 155
7 Jac. I. c. 6 ... ..	Oath of allegiance ... .. 63, 89
3 Car. I. c. 1 ... ..	Petition of Right... .. 35, 301, 339
16 Car. I. c. 1 ... ..	Triennial Parliaments ... .. 302
. . . . c. 8 ... ..	Assent of Parliament to impositions ... 339
. . . . c. 10 ... ..	Jurisdiction of Privy Council ... .. 324
. . . . c. 14 ... ..	Illegality of shipmoney ... .. 341
12 Car. II. c. 24 ... ..	Abolition of military tenures ... .. 207
. . . . c. 25 ... ..	Dispensation to sell wine by retail... .. 327
13 Car. II. st. 1, c. 5 ... ..	Right of petitioning ... .. 372
15 Car. II. c. 10 ... ..	Subsidies... .. 50
16 Car. II. c. 1 ... ..	Session of Parliament every three years 302
16 & 17 Car. II. c. 1 ... ..	Subsidies ... .. 50

	PAGE
22 & 23 Car. II. c. 1 ...	Legislative rights of King... 314
25 Car. II. c. 2 ...	Tests Act ... 328, 329
. . . . c. 9 ...	Enfranchisement of Durham ... 346
30 Car. II. c. 1 ...	Parliamentary oath ... 63, 89
1 Will. & Mary, c. 1 ...	Oath of abjuration ... 90
. . . . . st. 2. c. 2	Bill of Rights ... 37
	Freedom of Speech ... 159
	Dispensing and Suspending power ... 333
	Taxation... 341
	Right of petitioning ... 372
. . . . . c. 21 ...	Speaker's precedence ... 148
6 Will. & Mary, c. 2 ...	Triennial Act ... 73, 393
7 & 8 Will. III. c. 15 ...	Dissolution on demise of Crown ... 74
. . . . . c. 25 ...	Disqualification of infant ... 79, 124
	Fagot votes ... 127
12 & 13 Will. III. c. 2 ...	Act of Settlement:
	Disqualification of placemen ... 8, 38, 41, 83
	. . . . . of aliens ... 80, 215
	Pardon not pleadable in bar of impeach- ment ... 365
. . . . . c. 3 ...	Judges removable on address of Houses... 378
13 Will. III. c. 6 ...	Privilege. Freedom from arrest ... 155
2 & 3 Anne, c. 18 ...	Oath of Abjuration ... 90
4 Anne, c. 8 ...	Privilege. Freedom from arrest ... 155
5 Anne, c. 8 ...	Official disqualifications repealed ... 83
	Union with Scotland ... 7, 43, 79
6 Anne, c. 7 ...	Art. 22. As to peerage ... 209
. . . . c. 11 ...	Disqualification of office or pension ... 83, 87
. . . . c. 40 (7 Ruff.)	Title of peerage ... 190
. . . . c. 78 ...	Dissolution on demise of Crown ... 74
9 Anne, c. 5 ...	Scotch peerage ... 219
10 Anne, c. 23 ...	Land qualification ... 94
1 Geo. I. c. 15 ...	Multiplication of votes ... 127
. . . . c. 38 ...	Parliamentary oaths ... 90
. . . . c. 56 ...	Septennial Act ... 73
2 Geo. II. c. 24 ...	Disqualification. Pensions ... 87
11 Geo. II. c. 24 ...	Effect of decision of Election Committee ... 111
15 Geo. II. c. 22 ...	Privilege. Freedom from arrest ... 156
10 Geo. III. c. 16 ...	Disqualification. Offices ... 86, 350
. . . . c. 50 ...	Grenville Act. Disputed returns ... 171, 376
14 Geo. III. c. 58 ...	Freedom from arrest. Privilege ... 156
22 Geo. III. c. 45 ...	Residence in constituency not needed ... 94, 105
. . . . c. 82 ...	Government contracts ... 87, 350
	Disqualification. Court officials ... 85, 349
	. . . . . Pensioners ... 87
24 Geo. III. c. 26 ...	Vacancy of seat by death or peerage ... 168
26 Geo. III. c. 96 ...	Impeachment ... 366
33 Geo. III. c. 13 ...	Royal assent ... 318
35 Geo. III. c. 29 ...	Property qualification (Ireland) ... 118
37 Geo. III. c. 127 ...	Dissolution on demise of Crown ... 71, 74
39 & 40 Geo. III. c. 14 ...	Acceleration of meeting of Parliament ... 70

	PAGE
40 Geo. III. c. 67 ...	Union with Ireland ... 7, 43, 81, 129
	Irish Peerage ... 191, 221
41 Geo. III. c. 52 ...	Government contracts and Irish members 87
. . . . . c. 63 ...	Disqualification. Clergy ... 81
45 Geo. III. c. 125 ...	Impeachment ... 366
49 Geo. III. c. 118 ...	Public sale of seats ... 354
53 Geo. III. c. 89 ...	Dispatch of Parliamentary writs ... 59
4 Geo. IV. c. 55 ...	Disqualification of infants ... 79
10 Geo. IV. c. 7 ...	Roman Catholic relief ... 90
	Disqualification of priests ... 81
. . . . . c. 8 ...	Disqualification of 40s. freeholders (Ireland) 116
2 & 3 Will. IV. c. 45 ...	Reform Act (England) 106, 112, 117, 118, 126, 128
	Redistribution of seats ... 131
. . . . . c. 65 ...	Reform Act (Scotland) 81, 82, 115, 119, 131
. . . . . c. 88 ...	Reform Act (Ireland) ... 116, 131
3 & 4 Will. IV. c. 88 ...	Property qualification (Ireland) ... 118
6 & 7 Will. IV. cc. 13, 29	Disqualification of Police (Ireland) ... 125
3 & 4 Vict. c. 9 ...	Privilege of publication by order of House 166
4 & 5 Vict. c. 58 ...	Committee for disputed returns ... 171
10 & 11 Vict. c. 21 ...	Soldiers at elections ... 139
. . . . . c. 52 ...	Scotch representative peers ... 201, 220, 235
11 & 12 Vict. c. 98 ...	Committee for disputed returns ... 171
13 & 14 Vict. c. 21 ...	Female voters ... 123
. . . . . c. 69 ...	Franchise (Ireland) ... 116, 118
14 & 15 Vict. c. 87 ...	Scotch representative peers ... 219
15 & 16 Vict. c. 23 ...	Return of writs for elections ... 55
16 & 17 Vict. c. 13 ...	Polling at elections ... 139
. . . . . c. 68 ...	Returning officer ... 82, 103
18 & 19 Vict. c. 84 ...	Speaker's deputy ... 150
19 & 20 Vict. c. 1 ...	Clerk of House of Commons ... 151
. . . . . c. 18 ...	Disqualification. Employment (Scotland) 125
21 & 22 Vict. c. 26 ...	Land qualification abolished ... 94
. . . . . c. 78 ...	Certain Committees of Lords and Com- mons may administer oath ... 376
. . . . . c. 49 ...	Removal of Jewish disability ... 91
. . . . . c. 106 ...	Disability of Fifth Under-Secretary ... 85
. . . . . c. 110 ...	Vacation of seat by taking office ... 168
24 & 25 Vict. c. 53 ...	University elections ... 139
. . . . . c. 83 ...	Disqualification. Employment (Scotland) 125
26 Vict. c. 20 ...	Vacation of seat ... 168
27 & 28 Vict. c. 34 ...	Under-Secretaries of State in Commons 84, 85
29 & 30 Vict. c. 19 ...	Parliamentary oath ... 92, 175, 217
30 & 31 Vict. c. 81 ...	Prorogation of Parliament ... 71
. . . . . c. 102 ...	Representation of the people (England) 85, 106, 113, 117-120, 128, 131
	s. 27. Fagot votes ... 128
	s. 40. Receipt of alms ... 126
	s. 51. Demise of Crown ... 74
31 & 32 Vict. c. 48 ...	Representation of the people (Scotland) 115, 118, 119, 121, 128, 131
	s. 14. Fagot votes ... 128

	PAGE
31 & 32 Vict. c. 49 ... Representation of the people (Ireland) 116, 121	
... c. 72 ... Promissory oaths ... 63, 91	
... c. 125 ... Parliamentary elections ... 168, 171	
32 & 33 Vict. c. 111 ... Bishop's resignation ... 192, 227	
... c. 15 ... Civil service pensions ... 87	
... c. 41 ... Diplomatic pensions ... 87	
... c. 42 ... Poor rate assessment and collection 114, 121	
... Disqualification of Archbishops and Bishops (Irish) ... 210	
... c. 68 ... Law of evidence amendment ... 92	
33 & 34 Vict. c. 14 ... Naturalization. Disqualifications of aliens 81, 126, 215	
... c. 23 ... Disqualifications of convict ... 88, 126, 216	
... c. 49 ... Law of evidence amendment ... 92	
... c. 77 ... Privilege as to serving on juries ... 157	
... c. 81 ... Acceleration of meeting of Parliament 70, 71	
... c. 91 ... Removal of clerical disabilities ... 82	
34 & 35 Vict. c. 73 ... President of Local Government Board may sit in Commons ... 85	
... c. 50 ... Bankrupt. Disqualifications of ... 215	
... c. 83 ... Committees of Commons may administer oath ... 376	
... c. 116 ... Men of the law may sit for counties ... 94	
35 & 36 Vict. c. 33 ... Ballot Act ... 57, 59, 135, 136, 137, 138	
37 & 38 Vict. c. 22 ... Revenue officers' disabilities removed ... 125	
38 & 39 Vict. c. 77 ... Judicature Act ... 368	
... Judges' disqualification ... 83	
39 & 40 Vict. c. 59 ... Appellate Jurisdiction Act ... 227, 368	
41 & 42 Vict. c. 3 ... Householder qualification ... 120	
... c. 4 ... Polling places ... 139	
... c. 26 ... Rating and Registration 112, 113, 114, 121, 135	
... c. 68 ... Bishops' Act ... 210	
42 & 43 Vict. c. 75 ... Parliamentary elections ... 171	
45 & 46 Vict. c. 26 ... Election of peers ... 222	
... c. 49 ... Commission in militia compatible with seat in Commons ... 86	
46 & 47 Vict. c. 51 ... Corrupt practices ... 89, 126	
... c. 52 ... Bankruptcy ... 89, 168, 215	
48 Vict. c. 3 ... Representation of the people 107, 116-21, 127	
... c. 10 ... Hours of polling ... 139	
... c. 15 ... Registration ... 134	
48 & 49 Vict. c. 23 ... Redistribution of seats ... 131	
... c. 46 ... Medical relief ... 126	
49 Vict. c. 16 ... Disqualification. Lunacy ... 79, 80	
50 & 51 Vict. c. 9 ... Police disabilities removed ... 125	
... c. 70 ... Appellate jurisdiction, amendment 192, 227, 368	
51 & 52 Vict. c. 46 ... Oaths Act ... 64, 93, 217	
53 & 54 Vict. c. 71 ... Disqualification of bankrupt ... 88	
7 Edw. VII. c. 9 ... Commission in Reserve Forces compatible with seat in Commons ... 86	

**TEXT OF  
THE PARLIAMENT ACT OF 1911**





# PARLIAMENT ACT, 1911

[1 & 2 GEO. 5. CH. 13.]

## ARRANGEMENT OF SECTIONS.

### Section.

1. Powers of House of Lords as to Money Bills.
2. Restriction of the powers of the House of Lords as to Bills other than Money Bills.
3. Certificate of Speaker.
4. Enacting words.
5. Provisional Order Bills excluded.
6. Saving for existing rights and privileges of the House of Commons.
7. Duration of Parliament.
8. Short title.

## CHAPTER 13.

An Act to make provision with respect to the powers of the A. D. 1911.  
House of Lords in relation to those of the House of  
Commons, and to limit the duration of Parliament.

[18th August, 1911.]

**W**HEREAS it is expedient that provision should be  
made for regulating the relations between the two  
Houses of Parliament :

And whereas it is intended to substitute for the House of  
Lords as it at present exists a Second Chamber constituted  
on a popular instead of hereditary basis, but such substitu-  
tion cannot be immediately brought into operation :

And whereas provision will require hereafter to be made  
by Parliament in a measure effecting such substitution for  
limiting and defining the powers of the new Second  
Chamber, but it is expedient to make such provision as  
in this Act appears for restricting the existing powers of  
the House of Lords :

A. D. 1911. Be it therefore enacted by the King's most Excellent Majesty, by and with the advice and consent of the Lords Spiritual and Temporal, and Commons, in this present Parliament assembled, and by the authority of the same, as follows:—

Powers of  
House of  
Lords as  
to Money  
Bills.

1.—(1) If a Money Bill, having been passed by the House of Commons, and sent up to the House of Lords at least one month before the end of the session, is not passed by the House of Lords without amendment within one month after it is so sent up to that House, the Bill shall, unless the House of Commons direct to the contrary, be presented to His Majesty and become an Act of Parliament on the Royal Assent being signified, notwithstanding that the House of Lords have not consented to the Bill.

(2) A Money Bill means a Public Bill which in the opinion of the Speaker of the House of Commons contains only provisions dealing with all or any of the following subjects, namely, the imposition, repeal, remission, alteration, or regulation of taxation; the imposition for the payment of debt or other financial purposes of charges on the Consolidated Fund, or on money provided by Parliament, or the variation or repeal of any such charges; supply; the appropriation, receipt, custody, issue or audit of accounts of public money; the raising or guarantee of any loan or the repayment thereof; or subordinate matters incidental to those subjects or any of them. In this subsection the expressions 'taxation', 'public money', and 'loan' respectively do not include any taxation, money, or loan raised by local authorities or bodies for local purposes.

(3) There shall be endorsed on every Money Bill when it is sent up to the House of Lords and when it is presented to His Majesty for assent the certificate of the Speaker of the House of Commons signed by him that it is a Money Bill. Before giving his certificate, the Speaker shall con-

sult, if practicable, two members to be appointed from the A. D. 1911.  
Chairmen's Panel at the beginning of each Session by the  
Committee of Selection.

2.—(1) If any Public Bill (other than a Money Bill or a Bill containing any provision to extend the maximum duration of Parliament beyond five years) is passed by the House of Commons in three successive sessions (whether of the same Parliament or not), and, having been sent up to the House of Lords at least one month before the end of the session, is rejected by the House of Lords in each of those sessions, that Bill shall, on its rejection for the third time by the House of Lords, unless the House of Commons direct to the contrary, be presented to His Majesty and become an Act of Parliament on the Royal Assent being signified thereto, notwithstanding that the House of Lords have not consented to the Bill: Provided that this provision shall not take effect unless two years have elapsed between the date of the second reading in the first of those sessions of the Bill in the House of Commons and the date on which it passes the House of Commons in the third of those sessions.

Restric-  
tion of the  
powers of  
the House  
of Lords  
as to Bills  
other than  
Money  
Bills.

(2) When a Bill is presented to His Majesty for assent in pursuance of the provisions of this section, there shall be endorsed on the Bill the certificate of the Speaker of the House of Commons signed by him that the provisions of this section have been duly complied with.

(3) A Bill shall be deemed to be rejected by the House of Lords if it is not passed by the House of Lords either without amendment or with such amendments only as may be agreed to by both Houses.

(4) A Bill shall be deemed to be the same Bill as a former Bill sent up to the House of Lords in the preceding session if, when it is sent up to the House of Lords, it is identical with the former Bill or contains only such alterations as

A. D. 1911. are certified by the Speaker of the House of Commons to be necessary owing to the time which has elapsed since the date of the former Bill, or to represent any amendments which have been made by the House of Lords in the former Bill in the preceding session, and any amendments which are certified by the Speaker to have been made by the House of Lords in the third session and agreed to by the House of Commons shall be inserted in the Bill as presented for Royal Assent in pursuance of this section :

Provided that the House of Commons may, if they think fit, on the passage of such a Bill through the House in the second or third session, suggest any further amendments without inserting the amendments in the Bill, and any such suggested amendments shall be considered by the House of Lords, and, if agreed to by that House, shall be treated as amendments made by the House of Lords and agreed to by the House of Commons ; but the exercise of this power by the House of Commons shall not affect the operation of this section in the event of the Bill being rejected by the House of Lords.

Certificate  
of  
Speaker,  
✓

3. Any certificate of the Speaker of the House of Commons given under this Act shall be conclusive for all purposes, and shall not be questioned in any court of law.

Enacting  
words.

4.—(1) In every Bill presented to His Majesty under the preceding provisions of this Act, the words of enactment shall be as follows, that is to say :—

‘Be it enacted by the King’s most Excellent Majesty, by and with the advice and consent of the Commons in this present Parliament assembled, in accordance with the provisions of the Parliament Act, 1911, and by authority of the same, as follows.’

(2) Any alteration of a Bill necessary to give effect to this section shall not be deemed to be an amendment of the Bill.

5. In this Act the expression 'Public Bill' does A. D. 1911.  
not include any Bill for confirming a Provisional Provisional Order  
Order. Bills excluded.

6. Nothing in this Act shall diminish or qualify Saving for existing  
the existing rights and privileges of the House of rights and privileges  
Commons. of the House of Commons.

7. Five years shall be substituted for seven Duration of Parlia-  
years as the time fixed for the maximum duration ment.  
of Parliament under the Septennial Act, 1715. 1 Geo. 1, stat. 2,  
c. 38.

8. This Act may be cited as the Parliament Act, Short title.  
1911.

The following are the references to changes made in this volume :

	PAGE	
Introduction.	11, 12.	Legislative sovereignty and the Cabinet.
Chapter III.	46.	Parties to legislation.
	73.	Duration of Parliament.
	74.	Demise of the Crown.
Chapter IV.	149-151.	Duties of Speaker.
	189.	Payment of members.
Chapter V.	237-239.	Reform of the House of Lords.
Chapter VI.	266-267.	The Parliament Act and Debate.
	269-271.	Money Bills.
	283-290.	The Houses in conflict, and the prerogative of making peers.
Chapter VIII.	357.	Influence of the Crown on the House of Lords.

Oct. 1911

## INTRODUCTION

OUR constitution presents some difficulties to the student which it may be well to note at the outset. To do so will explain why I have commenced each volume with a brief historical sketch, in the one case of the development of Parliament, in the other of the growth and gradual limitation of the Prerogative.

The difficulties to which I shall refer arise from the fact that a constitution which began with the rude organization of a group of settlers in a hostile country has been adapted first to the wants of a highly civilized race, then to the government of a vast Empire, and this by an insensible process of change, without any attempt to recast it as a whole, or even to state it in written form.

Our constitution is, in consequence, a somewhat rambling structure, and, like a house which many successive owners have altered just so far as suited their immediate wants or the fashion of the time, it bears the marks of many hands, and is convenient rather than symmetrical. Forms and phrases survive which have long since lost their meaning, and the adaptation of practice to convenience by a process of unconscious change has brought about in many cases a divergence of law and custom, of theory and practice. Let us begin with some of the things that may puzzle the student.

The student who has undergone a course of analytical jurisprudence, even with all the necessary reservations which are now made to Austinian theory, may be excused if he asks, Where is the Sovereign? Austin is ready with an answer—clear, logical, and wholly inapplicable to the constitution of to-day. Parliament is the sovereign. Sovereignty in our constitution

‘It is absurd,’ says Austin, ‘to say that Parliament has legislative sovereign powers, but that the executive sovereign powers belong to the King alone. If the Parliament according to Austin.



Is Parlia-  
mentsove-  
reign ?

is sovereign or absolute, every sovereign power must belong to that sovereign body or to one or more of its members as forming a part or parts of it. The powers of the King, considered as detached from that body, or the powers of any of its members considered in the same light, are not sovereign powers, but are simply and purely subordinate<sup>1</sup>.

The assumption here is wholly unwarranted by facts, as is his deduction from it, that the King is merely an emanation of the sovereignty of Parliament. Nor was this really necessary for Austin's purpose, which was to ascertain the province of Jurisprudence. This he finds to be conterminous with the rules of conduct made and enforced by the State ; and, so far, his analysis is helpful ; but when he comes to analyse the composition of the Sovereign or State we are at once landed in difficulties of his own making. Sovereignty in his view must be one and indivisible.

Theory of  
indivisi-  
bility

The theory of the indivisibility of sovereignty is a trouble to the student, whether as a constitutional lawyer he tries to adjust it to the relations of executive and legislature, or whether as an international lawyer he applies it to protected States, whose sovereignty is only impaired in respect of the control exercised over their foreign relations by another State.

unsuited  
to complex  
political  
societies.

Theoretically there is no reason why legislative and executive duties should not be discharged by the same person or body of persons. It would be possible for such a person or body to make laws binding on the whole community, to work the machinery of government, enforce the law, determine policy in home and foreign affairs, make peace and war. But, in fact, as M. Laveleye has pointed out<sup>2</sup>, the construction of free and highly organized States is complex, and the complexity increases with the guarantees for liberty which the constitution offers. Laws and taxes which affect all are, in such societies, agreed upon by a body

<sup>1</sup> Austin, Jurisprudence, i. 257.

<sup>2</sup> 'On pourrait même formuler le principe, que plus un régime politique est simple, plus il se rapproche à l'absolutisme : au contraire, plus il donne de garanties à la liberté, plus il est compliqué. Rien n'est aussi simple que le despotisme oriental, rien n'est aussi compliqué que les institutions des États-Unis.' *Essai sur les formes de gouvernement*, p. 59.

large enough to be representative of the whole community, too large for the prompt and united action which is needed of an executive if the executive is to be vigorous and efficient.

In truth, the picture which Austin draws of a legislature issuing commands, enforced by an executive which in some way may be regarded as a part of the legislature, is remote from the facts of our own, and of most, if not all, modern constitutions. The cohesion and good government of a State depend upon the certainty and promptitude with which law, made by the legislature, past or present, is enforced by the executive; but this does not mean that executive and legislature are one; rather it means that the law, and those who enforce the law, are alike in accord with the public opinion of the community. And the executive does other work besides enforcing obedience to the law.

Not in  
accord  
with facts.

Take the circumstances which attend the commencement of a war. The King declares war, acting on the advice of his ministers. Parliament is informed when this has been done. Troops are moved by order of military officers, for whose action the Secretary of State for War is responsible. The discipline of the troops is secured by the legislative provisions of the Army Act, and in this respect Austin might be satisfied; but the general direction of affairs, for which the Secretary of State is responsible, cannot be traced to Parliamentary authority. His powers are derived from the Letters Patent which constitute the Army Council, and the Order in Council which distributes its business—documents which Parliament may criticize but which draw nothing of their authority from Parliamentary sanction.

Illustra-  
tion.

In our constitution we can say not only that the executive and legislative powers are distinct to the extent above described, but that we can trace the process by which they have become distinct. The common element in both is the Crown. The Crown in Council once made laws and transacted the business of government. As the business of government increased in volume two things happened: the conduct of business in various departments passed into the hands of servants or ministers of the Crown; and the cost of government necessitated an appeal to the Commons,

Executive  
and legis-  
lative are  
distinct in  
our consti-  
tution.

through their representatives, to grant the necessary supplies. Legislation, which meant the redress of grievances, was made a condition precedent to supply, and thus the law-making and taxing power passed into the hands of Parliament, a body distinct from the executive, who are the ministers of the Crown. The legislative and executive powers have, as it were, bifurcated, and there is a real dualism in our constitution, the Crown in Parliament and the Crown in Council. It may be said that the King acts on the advice of his ministers, that ministers are chosen and retained in deference to the views of the majority of the House of Commons, and that thus we get the union of all branches of sovereignty. But the sovereign eludes us even here, for the majority of the House of Commons does not constitute Parliament; and it must be admitted that facts are against the theory that sovereignty is one and indivisible.

*l*  
Diver-  
gence of  
theory and  
practice:

in legisla-  
tion,

But let us set aside the idea that sovereignty is one and indivisible, and ask what is the legislature, and what is the executive in this country, and how they work; we find at once a sharp divergence between theory and practice. We find that the King summons and dissolves Parliament, and that laws are enacted by 'the King's most excellent Majesty by and with the advice and consent of the Lords Spiritual and Temporal and Commons in this present Parliament assembled, and by the authority of the same.' But we also discover that in fact the Commons have an exclusive initiative and virtual control over one branch of legislation—the laws by which taxes are imposed—and that all legislation of an important or contentious character takes its origin in their House, and under the circumstances provided for in the Parliament Act (1911) may take effect without the consent of the Lords; that the power of the Crown has been reduced, since the reign of Henry VI, to a right to express assent or dissent to measures sent up by Lords and Commons; and that the veto which is all that custom has left to the Crown has not been exercised for 200 years.

We turn to the executive. Ministers, as we learn, in admin-  
 are the King's servants, appointed by him to superintend istration.  
 the various departments of government, holding office  
 during pleasure; they stand in no legal relation to Par-  
 liament except that if office is accepted by a member of the  
 House of Commons his seat is as a rule vacated, and he  
 must offer himself for re-election, and that many offices  
 are the creation of statute, and their holders are paid, for  
 the most part <sup>1</sup>, by Parliamentary grant.

But we shall discover that the legal relations of King and Position of  
 ministers or of ministers and Parliament convey little idea Ministers:  
 of the practice. It is true that the King appoints the  
 ministers, but he does so on the advice of the Prime  
 Minister. It is true that he also appoints the Prime Minister,  
 but the Prime Minister is practically chosen for him by the  
 opinion of the party which a general election has placed  
 in a majority in the House of Commons.

The ministers thus chosen are not merely administrators of the  
 of branches of the public service; the chief among them Cabinet.  
 form a compact body called the Cabinet, which determines  
 the general policy of the country at home and abroad.  
 They hold office at the King's pleasure, but the King could  
 not at his pleasure dismiss any one of them without  
 imminent risk of losing the services of all. There is no  
 statutory necessity that any one of them should be in  
 Parliament, but in practice a minister who could not obtain  
 a seat in the House of Commons, and who was not, and  
 did not wish to be, a member of the House of Lords, could  
 not continue to hold office for many weeks.

The secret lies in our system of party government. Party  
 These heads of departments may or may not be skilled Govern-  
 administrators—most likely they are not—but they are ment.  
 eminent party leaders, and as representing the party which  
 the electorate has returned to power, they control the  
 policy of the country and transact, with the aid of a skilled  
 permanent staff, the business of their offices <sup>2</sup>.

<sup>1</sup> The Secretary of State and Under Secretary for India are paid out of the revenues of India, and the Chancellor of the Duchy of Lancaster out of the revenues of the Duchy.

<sup>2</sup> See vol. ii, The Crown, Part ii, Introduction.

Their presence in Parliament is necessary in the interests of the department, and in the interests of the party. The departments need to be defended, in case of adverse criticism, and to obtain the legislation which may concern their business; and the policy of the party, whether in legislation or administration, needs to be expounded by its leaders to the representatives of the people. We cannot imagine conditions in which a department might be left without authoritative defence to Parliamentary criticism, or in which the general policy of the Government was expounded only on the platform or in the public press.

These things are not necessary in law, but they have become necessary in fact, and so it comes about that if our constitution were stripped bare of convention, and displayed in its legal nakedness, it would be found not only unrecognizable, but unworkable.

Difficulty  
of finding  
the consti-  
tution.

But the student who has sought in vain among our institutions for the Austinian sovereign, who has sought with no more success to find out how the constitution works by examining the legal relations of our King, his ministers, and Parliament, may be driven to ask, Where is the Constitution?

It is un-  
written.

The answer must be that the constitution is still unwritten,<sup>1</sup> and that it never has been written out for the information of those who live under it or for the guidance of those who have to work it. The constitution must be found, by those who seek it, in statutes, in judicial decisions, in custom, in convention; it is set forth in textbooks; it may be learned in its important features by observation of the course and conduct of politics; but in authoritative documentary form it is not to be found. There are open questions on which judicial decision, which is usually of a negative character, might yet throw light on the limitations of the Privileges of Parliament, and the Prerogative of the Crown.

<sup>1</sup> The Parliament Act 1 & 2 Geo. V. c. 13 has fixed in statutory form the relations of the two Houses in important matters of legislation: but this is only an addition to the difficulty of giving a comprehensive account or survey of the patchwork of our institutions.

The subject may well puzzle alike the foreign jurist who is prepared to say, with de Tocqueville, that the English constitution does not exist, and the English student who is prepared to maintain that it is a monument of political sagacity, if he can only find it.

Whether written or unwritten, constitutions may develop in unanticipated directions. Use alters the shape of things so pliable as political institutions; an inconvenient rule is not observed, a convenient practice creeps in. The written constitution of the United States, rigid and uncompromising as its terms appear, has undergone this insensible modification in some of its most important parts. The whole machinery of a Presidential election has come to work in a manner never contemplated by the makers of the constitution, while the Senate, in its origin a Council of delegates entrusted with duties mainly executive and bound by such instructions as they might receive from those whom they represented, has become a Second Chamber exercising a free discretion as critics and moderators of the action of the House of Representatives.

But if a written constitution can thus by mere force of usage depart from the lines on which it was framed, a constitution which is nowhere set forth in a written form must needs be more liable to change. For custom cannot so easily encrust institutions which are ever present in black and white to those who live under them. And, moreover, where a constitution is written it is seldom changeable by the ordinary process of legislation. The ordinary legislature is not omnipotent.

Our Parliament is omnipotent, and works with the same procedure whether it is removing an obsolete form, or whether it is disestablishing a Church or extending the franchise to a million or more of its fellow citizens.

One thing no Parliament can do: the omnipotence of Parliament is available for change, but cannot stereotype rule or practice. Its power is a present power, and cannot be projected into the future so as to bind the same Parliament on a future day, or a future Parliament.

The Acts of Union with Scotland and Ireland afford a

Illustration from Acts of Union.

good illustration of the extraordinary powers of Parliament and of the limitations to which I have referred.

Each Act of Union involved the absorption of two sovereign legislative bodies in a new body different from either but possessing the powers of each: and each Act of Union contained provisions designed to be fundamental and unchangeable. No question was raised, or could be raised, as to the power of either Parliament to make this important change: but in each case the fundamental provisions have been altered by subsequent legislation.

This departure from terms which were intended to be permanent is the more noticeable because each Act was preceded by a settlement of the conditions of Union which is described as a treaty. In the first case the Parliaments of England and Scotland, in the second the Parliaments of Great Britain and Ireland, respectively, approved of terms in these treaties by which their sovereignty and their existence came to an end. Each Parliament with all its sovereign powers passed into a new body, the united Parliament of the two countries concerned in the transaction. But just as neither Parliament could make a law which should be unalterable by its successors, so the terms of a treaty of Union, though incorporated in the Act of Union, could not be placed beyond the powers of the new Parliament to alter.

Cannot bind its successor.

A Parliament may surrender its sovereignty to a new body, but it cannot in so doing place limitations on the power of that body unless the Act of Union altered the character of the constitution. If the new Parliament was to enjoy the same powers as the Parliaments which were united in it, they could not bind the new Parliament any more than the new Parliament could bind its successors. Parliament therefore is omnipotent to change, but cannot bind itself not to change, the constitution of which it forms a part.

Cannot forecast effects of legislation.

Not only is Parliament unable to control the future, it cannot forecast the effect of changes deliberately made. When Parliament in 1705 repealed the clause in the Act of Settlement which excluded holders of office from the

House of Commons, no one anticipated the system of Cabinet and party government which was thereby rendered possible. When Parliament in 1884 based our scheme of representation on single-member constituencies, Mr. Gladstone maintained that the change would ensure a better representation of minorities. Few anticipated the result, which we now experience—the hopeless position of minorities in some constituencies, the violent fluctuations of opinion in others.

Our constitution is thus exposed to changes deliberately brought about by our sovereign legislature, with results which do not always correspond to the intentions of the legislature.

But there are other liabilities to change besides those which come from the deliberate action of the legislature or its possible, unexpected, and incidental results.

A constitution largely based on convention may be altered by processes which, though unobserved in their action, will ultimately affect the balance of power in the State. Changes of practice.

The Cabinet, as I have endeavoured to show elsewhere, The Cabinet. was no creation of a man of political genius. It began as a group of prominent personages with whom the King found it more satisfactory to discuss the business of the country than with the Privy Council or any definitely constituted committee of that body. Gradually this inner circle of advisers comes to be of one political complexion; gradually it comes to be composed exclusively of the heads of Government departments; no one can say when it became an accepted rule that these persons should be in one or other House of Parliament.

George I did not care to preside at discussions conducted in a language of which he was ignorant. Thenceforward it became the accepted rule that the King should leave to his ministers the determination of the policy of the country. Retirement of King from Cabinet. The theory of ministerial responsibility and the constitutional position of the Prime Minister gained immensely in force, if they did not owe their existence, to the fact that George I was an imperfect master of English.

In like manner the Standing Orders of the House of



**Rules of Procedure :** Commons, regulating its procedure in debate and the conduct of its business, may have results which go far beyond the mere convenience of the House or of the ministers who regulate the business of the House.

**their constitutional importance,** The primary conception of rules of debate was that they should be so framed as to give every opportunity for discussing and questioning the proposals of the ministers of the Crown; that the grievances of the people should be heard before the business of Government could be done. The opposition to royal power, and to the ministers who represented it, developed into a regard for the rights of the opposition, who were presumably in the minority, and when State interference with the ordinary affairs of life was mainly concerned with the raising of taxes and the extension and enforcement of the criminal law, it was well that the rules should provide every opportunity for orderly discussion.

**their adaptation to change of circumstance. Increase of business.** But the range of Government action widened, our Empire grew, and the union with Ireland and the extension of the franchise altered the composition of the House of Commons in number and in character. There were more subjects to discuss, the subjects themselves increased in complication, and there were also more members who desired to take part in debate. It became necessary to simplify procedure, and to obtain precedence for Government business if the ordinary business of Government was to be carried through within the reasonable limits of a Parliamentary session.

**Need of legislation.** Then, again, in the second half of the nineteenth century it became usual and expected that the Government of the day should in every session introduce one measure at least of important legislative change, on the passing of which a ministry staked its credit if not its existence. Thus a steadily increasing demand was made upon the time of the House.

**Growth of obstruction.** Not long after the establishment of this belief in the need of continuous legislative change—a period which one may fix at the commencement of Mr. Gladstone's ministry of 1868—arose the practice of organized obstruction which we associate with the name of Mr. Parnell.

Change in the conditions of debate led to changes in procedure. These at first took a shape designed to facilitate the ever-increasing volume of Government business by limiting opportunities for general discussion, and by appropriating more time to the exclusive use of the Government.

Extension of time allowed to Government.

Obstruction was met by rules which enabled the majority to bring any given debate to an issue by a vote taken with the consent of the Speaker, or Chairman of Committees. The closure, thus introduced, was further developed, and is now used, not merely to bring to an end a debate which was unduly prolonged, but to allocate beforehand the period allowed for discussion of the various parts and stages of a Bill. This again was applied at first to meet cases in which the progress of a Bill was being delayed by a mass of amendments which would seem to serve the purpose of obstruction. It has now come to be used to mark out the time which is to be spent on the whole course of a Bill through the House, and to do this before a Bill has been read a second time, or before it has gone into Committee.

Power to allocate use of time.

These rules of procedure must be described hereafter in detail: they serve here to show how changes made to meet an immediate difficulty or the convenience of the moment may alter the balance of forces in the constitution.

Incidental results.

For every change of recent times has tended to enhance the power of the Cabinet. A large part of the time of the House of Commons is by Standing Order appropriated to the business of Government; and for some little time past ministers have not scrupled to encroach largely, with the aid of their majority, on the time allotted to private members. The Government therefore have the initiative in legislation, and the time of the House; they can also determine the number of days to be given to the discussion of a Bill, and allocate to individual clauses such time as they please; they can also bring debate on any topic to an end by the use of the closure.

But their powers do not end here. The Parliament Act of 1911 reduces the rights of the Lords in the matter of finance to brief and formal discussion: in general legislation any Bill which has been passed by the Commons in

1 & 2  
Geo. V.  
c. 13.

three successive sessions and thrice rejected by the Lords, provided that two years have elapsed between the dates of its second reading on the first occasion, and the third reading on the third occasion of its passage through the Commons, may be presented to the King for the royal assent, though the Lords are not consenting parties.

Nor is this all. The discretionary prerogatives of the Crown as to the dissolution of Parliament, and the creation of peers with a view to providing ministers with a majority in the Second Chamber, have been placed unreservedly at the disposal of the Government, not to avert a deadlock, but to meet the contingency of a difference between the two Houses which had not at the time arisen.

Legislative sovereignty may be said to have passed to the Cabinet; and though ministers exercise this power because they represent the majority in the House of Commons, who in turn represent the majority in the country, it must be remembered that the threat of a dissolution is a curb to the will of any majority. Their Parliamentary existence is bound up with that of the Government, and to the certain expense of an election and the possible loss of a seat we must now add that the loss of a seat will henceforth mean the loss of a salary of £400 a year.

The results of these changes, often unintended, and not understood until they have been for some time at work, may serve to show that the student of any constitution, and more especially of our own, must look not merely to statutory provisions, to rules of procedure, or to an exact description of the legal relations of existing institutions. Real knowledge must be attained by inquiry into the practical working of the rules laid down, under the influence of the political forces in being; and even then he must realize that not only the action of an omnipotent Parliament but the silent process of changing use and custom may shift the balance of power, and that his work, though true to the letter, may soon cease to represent the spirit, of the constitution.

## CHAPTER I

### THE PLACE OF CONSTITUTIONAL LAW IN JURISPRUDENCE

AT the outset of a treatise on the English Constitution it is well to attempt some limitation or definition of the subject. If the law and custom of the Constitution is to be laid before the reader in an intelligible form, the writer has constantly to keep in mind the fact that, though nearly every law and every custom of the Constitution has a history—sometimes a long and interesting history—yet it is the Constitution as it now exists, and not the history of Constitutional law, with which he has to deal. And, again, although the operation of these laws and customs has to be explained as a matter of present living interest, it must never be forgotten that we are dealing with law and practice, and not with political science or political criticism.

At starting, therefore, I have to distinguish the subject of which I propose to treat from the topics dealt with on the one hand in the classical constitutional histories of Mr. Hallam and Dr. Stubbs, and on the other in the admirable descriptions of the practical working of the English Constitution supplied to us by Mr. Bagehot and Mr. Low. I have to make it clear that I am dealing with rules of law, and with customs which have grown up around these rules, obscuring in some departments the rules themselves. It may be—indeed it is—practically impossible to explain existing Law and Custom without some reference to its history, or to state existing practice without some account of the reasons for the divergence of the legal and the conventional Constitution; but such matters are illustrative and subordinate. The Laws and Customs, not their history or their political value, are what I am concerned with.

Constitutional Law  
in Juris-  
prudence

To define my subject, it is necessary to determine the place of constitutional law in the *Corpus Juris* of the country, and to distinguish, once for all, those topics with which constitutional law is apt to be confused.

is a branch  
of Public  
Law;

has to do  
with  
rights and  
duties of  
the  
Sovereign

and struc-  
ture of  
State.

In order to find the place of constitutional law it is needless to go further than Dr. Holland's analysis and classification of rights. A right is 'a capacity residing in one man of controlling with the assent and assistance of the State the actions of another.' Rights which may be enforced by one citizen against another constitute the body of Private Law. Rights which the State asserts to itself against the citizens, and rights which it permits to be exercised against itself, constitute Public Law. But inasmuch as the State is an artificial person, and, as such, assumes to itself the right to maintain order, to enforce the rules of conduct which it lays down, to possess property and compel the performance of contracts made with itself, and inasmuch as it is willing to incur proprietary and contractual liabilities, we need to inquire how this artificial person is constituted. This inquiry is the main business of the constitutional lawyer.

When we speak of the Sovereign body or State we mean the power by which rights are created and maintained, by which the acts or forbearances necessary to their maintenance are habitually enforced. This power in our community is diffused among a number of persons; in other words, our State is of complex construction. It consists of a number of persons or groups of persons who, in virtue of the part which they play in the working of the constitution, possess rights one against the other, and against the citizens in general. Their status is coloured by the fact that they are a portion of the machinery of Government.

The Crown is not Sovereign, nor is either House of Parliament, still less are the ministers or servants through whom the Crown conducts the executive business of Government; but each of these stands in established relations to the others, and to the general body of citizens, and of these relations some are fixed by law and some

by custom. For the State machinery may be said to consist of all who take part in the making or changing of the laws by which rights are created and protected, in the maintenance of order and settled rules of conduct within the community, in preserving its independence or representing it in its dealings with other communities. The connection and relations of these persons form the constitution of the country.

The analysis of this constitution, which forms the working machinery of the State, the consideration of its various parts, and the relation in which they stand to one another, is what I propose to undertake in respect of our own country.

But when we talk of the State we often use the term with some uncertainty as to its meaning. Sometimes the expression is used as equivalent to a whole community, or independent political society. Sometimes it is limited to the central force, or sovereign, in that society. When we say that a man has deserved well of the State we mean, generally, that all persons in the community ought to be grateful to him : we may also mean that this gratitude should be expressed in a definite manner by the central power which represents the community. When we say that certain things should be done or provided by the State we mean that the law-making force of the community should lay down certain rules of conduct, and that these should be enforced, and the necessary provision made by the executive or administrative force of the community. So we come to inquire into the composition of this structure which we call the State—this machinery for concentrating and working the forces of the community. And since this concentration and regular working, whether of law-making or executive force, is a thing of gradual growth, we may help ourselves to a clearer understanding of the matter by considering the early history of societies.

We need not trouble ourselves with the shifting groups of men who form the lowest types of savage life ; it is early enough to begin with aggregates bound together by

We need to know what we mean by the State.

The State begins

when rules of conduct are en-

forced by  
a central  
power.

ties of real or supposed kinship and by common customs. And when these customs begin to be observed in deference to some other sanction than the fear of individual violence or general ill-will that may follow upon their breach, we are able to trace the first germs of the State. Whether it is a council of priests, or of elders, or an individual habitually exalted above the rest by his strength or his cunning, so soon as conduct is enforced by some sanction, the fear of some evil, or the hope of some good, however indeterminate or occasional, which is not the arbitrary will of the casual bystander, or the general inclination of the crowd, we see the humble beginnings of the State or Sovereign.

Such  
power at  
first is  
slight,

but its  
sphere  
wide.

As in the  
Jewish  
polity.

The action of the State is at first inconsecutive and uncertain. It dares not depart from custom. It waits to be appealed to, and does not constrain conduct by fixed rules enforced by uniform penalties; it cannot always compel obedience to its own decisions. But in proportion as its power is weak its sphere is wide; religious observance and moral action, as well as the maintenance of order and the performance of promises, are its concern. The laws of the people of Israel cover every department of life—diet, cleanliness, domestic relations, religious observance, and many rules of general conduct which are observed in more highly organized communities either as matters of habitual morality, or by a few who aim at a life higher than that of the crowd. But set in the midst of this elaborate code are provisions which show the difficulty of bringing its enforcement under State control. The people are earnestly exhorted not to depend upon themselves for the decision of matters of controversy, each within his gates, but to make use of the courts indicated by the lawgiver, and, having there obtained judgment, to abide by the decision of the judge<sup>1</sup>.

The  
Roman.

Again, in looking at the laws of the Twelve Tables we are impressed, not merely by the variety of detailed provisions as to the breadth of roads and the conduct of funerals, but by the position and importance assigned to

<sup>1</sup> Deuteronomy xvii. 8.

Procedure. The first two tables are occupied with the rules for getting parties before the court and keeping them there till the dispute is settled. The third regulates the mode in which the successful suitor may put into execution the decision of the court. The whole is a good illustration of the extent of State interference, of the misgivings of the State as to its powers of action, and of the desire of the State to obtain for its tribunals the settlement of disputes. The Roman State was at this time a community sufficiently well organized to have a reasonable prospect of enforcing the sentence of its tribunals if it could once obtain submission to them; but our own history furnishes us with an instructive illustration of the difficulties of a society which had no machinery for carrying out the decisions of its courts and could at best provide for the settlement of quarrels by some general rules, the observance of which might confine disturbance within reasonable limits. Mr. Green gives a vivid picture<sup>1</sup> of the course of proceedings by which an offender was put outside the protection of the folk and ceased to be within its peace. But the folk could do no more than withdraw its protection; it had no means of enforcing a punishment; this was left to the individual. All that the community could do was to say that the injured man might apply a violent remedy without incurring its wrath. This need of a central force to strike at the offender, this incompatibility of the private feud with public order, eventually reconciled the Saxon people to the substitution of the King's peace for the folk's peace, of the strong arm of the executive for the general disapproval of the community, of State interference for *laissez faire*.

The  
Anglo-  
Saxon.

So soon as we find a community entrusting to some person or body of persons among its members the task of maintaining and enforcing its customs, we may say that we have found the beginnings of the State; but in all communities which have attained to a high degree of political development, no sooner does this force manifest itself in definite and systematic working than its functions

Growth of  
the State.

<sup>1</sup> Conquest of England, p. 22; and see Pollock and Maitland, History of English Law, ii. 448.



become more various and there takes place among those who have the exercise of it a separation into what in modern States we call the departments of Government. The maintenance of order and custom ceases to be dealt with by those who lead the armed forces of the society; the functions of the warrior are no longer combined with those of the judge; custom needs change as time goes on, or new customs, superseding the old, need to be checked by some general commands; a lawgiver is then required or a legislative assembly. To fight, to do justice, to assess and collect money, to make laws, is a heavy burden for an individual monarch or even for a body of men who have to act jointly in such matters. These duties come to be discharged by different servants of the same king, or by persons or bodies whom the popular choice elects. The original central force passes into more numerous hands, but its action becomes more constant and vigorous.

This dispersion of the forces which make up the Sovereign is one difficulty in the way of the Austinian analysis of Sovereignty. There is another which Austin made for himself by the arbitrary and unhistorical assumption that his Sovereign was at all times, and for all purposes, omnipotent: that there never was a time when this sovereign power could not alter at will such rules of conduct as it habitually enforced.

v The State enforces but does not change custom,

This is not the case. Legislation, in so far as it means the breaking up of customs and the introduction of new rules of conduct, is a thing almost inconceivable to an early state of society. The maintenance or restoration of the *status quo ante* in personal freedom and property was the object alike of the Jewish land law and of the Solonian Seisachtheia; the ideal states of the Greek philosophers were so constructed as to avert, so far as possible, the risk or the need of development or change. To look nearer home, the earlier volumes of our Statutes are full of minute regulations on matters of local or social custom, but when an important change in the law is contemplated the long and apologetic preambles, such as we read in the Statute of Wills, show how much explanation was needed to make it

acceptable to Parliament. To a modern House of Commons it is almost enough that a practice has prevailed for a long time to create an impression that such a practice must need examination and revision. But the step is a long one from the time when the State first enforces custom vigorously and constantly, to the time when it takes upon itself without fear or hesitation to recast or alter custom. till late in history.

And we must further note that in proportion as the State becomes stronger, more complex, more active, so does it define its sphere of action in such a way as to exclude from its operation those rules of conduct which are better left to the guidance of the moralist and the priest. The State, as conceived by the lawgiver of Deuteronomy, swept with its intermittent action the whole area of human conduct; but the modern legislator, who can apply constant uniform pressure to procure the acts and forbearances which he desires to enjoin, strives hard, though not with unvarying success, to set limits to State interference, to keep religion and morals wholly outside these limits, to ascertain with precision what it is best to leave to the individual and what must be enforced by the central authority. And as it gets stronger its sphere narrows.

We are not so much concerned with the sphere of State action, or, in other words, the amount and direction of the forces which the State brings to bear upon individual conduct, as with the existence, the strength, and the complexity of these forces. For these forces *are* the State; their strength makes it sovereign; their complexity is what the constitutional lawyer has to unravel. It is the power to strike at offenders within and without which gives to States and maintains in them an individual existence: it is this which preserves them from inward collapse, and from absorption into the existence of other States outside them. We do not allow that because the collective force of the community—in other words, the State—narrows its sphere of action, it thereby admits a diminution of its power; nor do we allow that because the machinery for setting it in motion is complicated—in other words, because political power is vested in many hands—its action is therefore less The strength of the State is the basis of Jurisprudence.

Its rules  
are the  
Law of the  
jurist.

regular and certain in the enforcement of such rules of conduct as are essential to its existence. Rather we should say that as the State defines the rules of conduct which it will enforce, and employs a uniform constraint for their enforcement—regular judicial process backed by the strong arm of the executive—it creates the Law with which alone the jurist can profitably deal.

What is  
Law.

All constraint which produces uniformity of human conduct by human agency may be regarded as creating Law. But so long as the constraint is wrought by public opinion which may act differently in different cases, or so long as the State cannot or will not use a regular machinery to ensure that penalty follows upon offence, the analytical jurist has no rules precise enough or stringent enough for him to work upon.

What is  
Positive  
Law.

When the State has attained to regularity in definition and enforcement of rules of conduct, then we get the Positive Law the province of which it was the object of Austin to determine, and then are completed the four sanctions of conduct or springs of human action indicated by Bentham.

The  
physical  
sanction,

A violent wind may blow a man against another in the street, or a stronger than he may take his hand and compel his signature to a document, or a fear of personal injury may prevent him from telling what he knows; this is the physical sanction.

the  
religious  
sanction,

Or a fear of wrath to come, or a desire for the growth within him of a spiritual life, may determine a man's conduct; this is the religious sanction.

the moral  
sanction,

Or a desire to obtain the good opinion, or avoid the active dislike of others, many or few; or to conform to a standard of conduct which he conceives to be good for himself or for the world at large, may make a man give up pleasure or endure pain; this is the moral sanction.

And thus a man may be deterred from picking a pocket because the man whose pocket he was going to pick turns round and catches his wrist; or by fear of God's anger or care for the spiritual life; or by the knowledge that his neighbours will condemn him: but yet another and a fourth

sanction must always be present to his mind, for the State, the or the community in its political character, has taken to itself the right to maintain order and to prevent violent and involuntary transfers of property by punishing offenders; and he knows that if he is detected he will be punished after such process of inquiry and in such ways as the State may provide.

the  
political  
sanction  
or Law  
proper.

The absolute strength of the State is a conception necessary to the foundation of any jurisprudence which is not merely a speculative and ideal arrangement of rules of conduct, but the complex structure of the State is the matter of difficulty to the student of constitutional law.

The King, who decides quarrels, declares customs, and leads his people in war, ceases after a while to discharge these duties as they become more elaborate and cover a wider surface. The community extends by absorbing others in conquest or by a natural process of growth, and can no longer assemble in its entirety to express its assent or dissent on matters of common interest. The various duties of the King pass into the hands of ministers, sometimes with the result, noticeable in our constitution, that he comes to be regarded as incapable of discharging these duties for himself. Thus we find in our own country that though every act in the State is in theory the act of the King or of the King in Council, there is scarcely an executive act which the King can perform without the intervention of a minister.

The  
specializ-  
ing of  
political  
functions.

And as the Crown has lost the power of independent action in matters administrative, so it has lost independence and initiative in legislation. First, the community demands to be represented when money is granted, to assent to the amount and incidence of the tax; then the representatives claim to state grievances, departures from custom or need of change, before they grant the tax; then, instead of leaving it to the King and his council to make and promulgate the required law, the representatives undertake to frame and settle the law. The King's legislative power sinks to a formal right to assent or dissent from

a law submitted to him, and this again to a merely formal expression of assent. Though statutes are nominally enacted 'by the King's most excellent Majesty,' and the Lords and Commons do but advise and consent and give their authority thereto, the legislative power of the Crown has shrunk to a shadowy veto.

From what has been said it will appear that the complexity of a modern State, and in particular the complexity of modern English institutions, gives enough work to the constitutional lawyer if he is to disentangle and set out in their various relations the institutions of his country. It is the more important to keep his province clear of other fields of study which have been touched upon in what has just been said. The history of the conception of the State, its sphere of duty, the best possible disposition of forces in it, the mode in which they are or have been disposed at different times—all these topics are more or less susceptible of confusion with the topic of constitutional law.

Let us try to sever them.

**Matters to be distinguished from Constitutional Law:** (a) There is the growth and development of the State in its rudimentary forms, the mode in which Law parts company with morals and religion, and becomes specialized as a code of conduct enforceable by a central power within the community—this is the department of historical jurisprudence, and is matter for the student of legal antiquities.

**Legal Antiquities;** (β) The determination of the rules which should be enforced by the State, as opposed to such as should be left to the moralist and the priest or preacher, is matter for the political economist and the student of political science: it is for them to discuss and settle the limits of State interference.

**Political Economy and the limits of State interference;** (γ) But when once it is determined what rules of conduct the State shall enforce, the business of the jurist and of the legislator begins. For when the State enforces acts and forbearances, it at once creates rights; the analysis and arrangement of these rights is the business of the jurist.

**Jurisprudence;** Moreover, it is one thing to say that certain acts and forbearances shall be made obligatory, and another thing to determine the mode in which they shall be so made, in what

form, and with what sanctions for disobedience. The theory of punishment (using the term punishment as including all the theory of legislation; forms of penalty or remedy for rights infringed), and the business of making laws, make up the province of the legislator.

(δ) There yet remains for consideration the actual structure of the State. We may ask, after determining the due limits of State interference and the objects of State control, how the forces of the community may best be disposed with a view to the attainment of these objects; and this is a part of the business of the student of political science<sup>1</sup>.

Or, we may ask how the forces of the community have been disposed in the past, noting the displacement and change of balance from time to time; and this is the business of the constitutional historian.

Or, lastly, we may consider how the forces of the community are disposed here and now; what are the legal rights and duties of the various parts of the sovereign body against one another and against the community at large; and how the whole works together. If in our constitution we find that law and custom diverge, we must note first what is the law, and then how it has been overgrown by custom; and in so doing we shall do the duty of the constitutional lawyer, and stray as little as need be into the domain of other studies. It is a trite saying that the present can be explained only by reference to the past, and to set forth a bare outline of things as they are would be un instructive, for in this country the tendency has always been to mend rather than to end an institution which has grown to be out of harmony with its surroundings. Nor is

<sup>1</sup> I may seem to have suggested under three different headings three matters, all of which might be included within the term 'political science.' It is not my business to find a terminology for the political philosopher, but his studies would seem to include three distinct things: the ascertainment of the limits of State Interference, so that he may know what the State should undertake; the theory of Legislation, so that he may know how the State should set about what it undertakes; and the Analysis and Comparison of Constitutions, so that he may know how the State may be best constructed and political forces best disposed with a view to the work of the State being done.

it desirable always to refrain from comment on the working of some parts of our institutions, or from comparison with institutions of a like character elsewhere. But our main business is to get a picture or at least a plan of the constitution as it is, in being, and with these reservations I will endeavour to set forth, in as brief space as the subject allows, the features of the Parliament of to-day.

## CHAPTER II

### HISTORICAL OUTLINE

IN dealing with the English constitution, regarded as Object of a historical outline. a set of legal rules, we cannot dissociate ourselves from history. Many of these rules have a long past, many more cannot well be understood without some consideration of the circumstances under which they first came into being. But if we are to deal with the constitution as it is, we must needs limit its historical aspect to the narrowest dimensions. Therefore I propose at the outset to note the various phases through which our Parliamentary institutions have passed, so that it may be possible to fit the rules into their historical origin as each comes to be dealt with. In another portion of this work it is necessary to traverse some of the same ground in sketching the history of the Prerogatives of the Crown: but though the development of our Parliamentary institutions is intimately involved in that of the growth and limitations of royal power, I hope that the reader will find no undue repetition in this and in the corresponding chapter of the succeeding volume. A historical outline will clear the ground and enable me to confine the rest of the book, as far as possible, to the law and custom of the constitution as it now is.

#### *The Saxon Constitution.*

The Anglo-Saxon or early English constitution was of Character of Saxon polity: the ordinary type of what Mr. Bagehot calls 'that common polity or germ of polity which we find in all the rude nations which have attained civilization—a consultative and tentative absolutism.' There was a King the chosen representative of the race, their leader in war and their judge in the last resort, an assembly of the wise, and the concourse of the people. But whatever may have been the



its weak-  
ness.

rights of the popular assembly or its position in the smaller kingdoms of the early Saxon times, it seems clear that when England became a united kingdom its government was conducted by King and witan. If the King had a strong will, and a good capacity for business, he ruled the witan; if not, the witan was the prevailing power in the State. But the Anglo-Saxon kingdom was always unstable. Perhaps from the mode in which the country was gradually acquired by the various conquering tribes, and from the gradual amalgamation of diverse kingdoms into one, the England of Saxon times was wanting in a sense of national unity. 'The cohesion of the nation,' says Dr. Stubbs<sup>1</sup>, 'was greatest in the lowest ranges. Family, township, hundred, county held together when ealdorman was struggling with ealdorman, and the King was left in isolated dignity.'

### *The Norman Administration.*

Saxon  
govern-  
ment and  
Norman  
centraliza-  
tion.

The local organization was strong and formed the substantial contribution of the Anglo-Saxon polity to our constitutional growth. When the Norman kings came over, bringing with them the formulated feudalism of the continent, the strength of local custom gave them valuable help in resisting the efforts of the barons to break up the kingdom into a number of small principalities. They bound the people to themselves by reserving to the King the allegiance of every landowner and excepting it from the fealty which he swore to his lord: they used the local customs and institutions as a machinery for the administration of justice and the assessment and collection of revenue, and they worked this machinery from a strong central government over which they watched with personal and incessant care.

The Norman central and administrative system was brought into contact with Saxon local and representative institutions by the sessions of the royal justices in the shire moot. At these sessions offenders were presented to the King's justices by the twelve lawful men of the

<sup>1</sup> Const. Hist. i. 211.

hundred, and the aid or tallage imposed by the King in Council was assessed and collected. So long as taxation fell upon land only, the liability of the tax-payer was settled by the sheriff, the justice, or the declaration of the tenant in chief<sup>1</sup>: but personal property, when under Henry II it came to be taxed, required a closer system of assessment. Thus, for the collection of the Saladin Tithe representative men of each township were chosen to determine the liabilities of the tax-payers, and here we get the beginning of the connection between taxation and representation. Shortly, one may summarize the whole history of the process which now begins. First, the representatives of the locality calculate, upon the spot, the amount due from each individual of a tax fixed by the King; next they are sent to Parliament to hear what are the needs of the King, and to determine the total amount which shall be granted in response to his demands: finally they determine, in Parliament, not merely the amount which the Crown is to receive but the way in which the Crown shall spend it.

Growth of representation in connection with taxation.

But this is at present far off. The King of the twelfth century judged and taxed, and commanded his feudal levies in war; he also issued edicts declaratory of custom or enacting changes of administration. This he did with the counsel and consent of the *Commune Concilium Regni*, a body which, in theory, consisted of all the tenants in chief, in practice, of the great noblemen and officials habitually attendant upon the King. But the system of administration was largely based on local representation for purposes of taxation and judicial procedure, and so we get a connection of the local and central power, which paved the way for parliamentary institutions and for the share in the government of the country which was given to all classes by the constitution of Edward I.

Counsel and consent.

The Great Charter is partly a declaration of rights, partly a treaty between Crown and people. For our purposes it contains a statement of the legal limits of the power of the Crown in a matter of paramount importance. It put on record the right of all tenants in chief to be

The Charter.

<sup>1</sup> Stubbs, Const. Hist. i. 505.

parties to the grant of any scutage or aid other than the three customary aids. The Charter thus contains an admission by the King that consent is a condition precedent to taxation, at any rate in some of its forms. It is true that the right conferred was limited in its operation to the tenants in chief, but the principle, once established, could not fail to be extended in its application.

### *The Constitution of Edward I.*

Parliament: its constitution.

When Edward I came to the throne in 1272, the feudal assemblage of tenants in chief had already given place, for important purposes of deliberation, to a body representative of barons, clergy, and commons: and in the representation of the commons Simon de Montfort had included the town as well as the shire. Here is the Parliament of to-day, for this assemblage received from Edward I the form which, with many changes in spirit and many more in detail, it still retains. The executive is the Crown in Council, the King acting with the advice of the wise men and magnates of the realm. The representative body, which at first only assents to taxation and afterwards makes laws, consists of the clergy, the baronage, and the commons, the three estates of the realm. The baronage come in response to a summons addressed by writ to each individually; the clergy are included in a like writ addressed to each bishop; the commons are summoned by a writ addressed to the sheriff of each county, commanding the election of two knights for each shire, two citizens for each city, two burgesses for each borough. The machinery of the county court, which had already been used for the choice of persons who should assess the taxation levied by the Crown, was now used for the choice of persons to represent the shire, and for the confirmation of the choice of their representatives by the towns. And these representatives, the choice of whom is notified from the sheriff in the county court to the Crown, meet in Parliament 'to enact such things as shall of our common council be or-

dained<sup>1</sup>. The Crown in Parliament begins to be distinguishable from the Crown in Council, but it was a long time before the respective functions of legislature and executive were clearly defined, and longer still before the two bodies found a means of working in some sort of habitual correspondence.

*The Commons as a Political Power.*

There was at first no clear recognition of the right of the Commons to a voice in legislation; the King in Council had been wont to declare customs and make administrative changes; he sometimes continued to do so with the concurrence of the Magnates only, and without waiting for the assent of the Commons. Such was the case with the Statute *Quia Emptores*, passed *instantia magnatum*. If they wanted new laws the Commons did not frame them, but asked for them; the Crown in Council legislated on petition of the Commons. Nor were the Commons always willing to recognize their position as critics if not advisers of the Crown and its ministers. When their opinion was asked on matters of executive government they were reluctant to give it, lest their advice should lead to expense for which they might be held responsible.

But the strength of the Commons lay in this, that when once the Crown had acknowledged its inability to lay taxes on the people without their consent, that consent could only be obtained through the representatives of the people in Parliament; and further, in days when there was no press, nor means of getting at public opinion by organized demonstrations, it was only through the assemblage of the Commons that the King could ascertain the feeling of the country. And though the Commons might be reluctant to express opinions which would compromise them in the matter of taxation, yet a capable king would learn without much difficulty whether the country was with him or not, and a wise king would not act in grave matters unless he knew that the country was at his back.

<sup>1</sup> Stubbs, *Charters*, 486.

Baronage  
allied  
with  
Commons.

So the Commons became necessary to the Crown: they were also necessary to the Baronage, for the Barons were frequently in an attitude of resistance to the Crown; it was upon them that feudal liabilities lay heaviest, and to have the Commons on their side was important to them. In the great Constitutional struggles of the middle ages, which ended in the acknowledgement by the Crown of its dependence upon Parliament for the grant of supply, we find the Barons leading and the Commons following their lead.

But though the King must go to the Commons for money, and though he could get no better information of the state of public feeling elsewhere, it was nevertheless a long time before they were able to exercise a substantial influence on the action of the executive, and some time before they could even acquire a hold upon legislation.

### *The Commons and the Executive.*

Inde-  
pendence  
of the  
executive.

For in their relations to the executive the criticism of the Commons was occasional, their control remote. They could denounce, but they could not denounce in time or complain before the mischief was done. If grants of money had been required at more regular intervals, or could have been appropriated more specifically to the purpose for which they had been asked, the Commons might at any time have stayed the hand of the executive by tightening the purse strings. But the Crown had an hereditary revenue from various sources which satisfied many of the needs of government. If the King wanted more, he asked for and obtained a grant of a tenth or a fifteenth on real or personal property. No means existed of assigning portions of the grant to particular services, or indeed of providing that the King should not spend the entire subsidy on purposes quite different from those for which it was asked. So when their grant was made the virtue had gone out of the Commons, they could exercise no control over policy till money was wanted again. Their efforts to keep a hold on the King's ministers show that they knew their weakness in this respect. The oath of office and the practice of

Checks de-  
vised by  
Commons.

impeachment were attempts to impose upon the servants of the Crown a sense of duty, by fear of more or less remote contingencies.

The demand sometimes made that the officers of state should be chosen or at any rate nominated in the Commons is a curious anticipation of the modern practice<sup>1</sup>. Only the Commons desired in the middle ages to do directly and formally what in the modern constitution they do indirectly. The mediaeval Parliament wanted to be able to elect for the Crown the minister of its choice. The modern Parliament is content with the power of making it impossible for the Crown to employ others than those whom the majority of the House of Commons favours for the time.

### *The Commons and Legislation.*

The control which the Commons exercised over legislation was acquired two hundred years sooner than their control over the executive; but not without a struggle.

The Confirmatio Chartarum (1297) made them necessary parties to taxation; and a statute of 1322 enacted that laws should not be made without their consent. But the consent thus required was of a vague and general sort. When asked for money they could claim that grievances should precede supply: but for such grievances as needed legislation for their redress the Commons had to be content with the King's promise that the necessary laws should be made. When Parliament had dispersed, the statute required was drafted and engrossed in the statute roll, or an ordinance issued to the same effect. But the Commons had no opportunity of seeing that their wishes were really carried out, or that if carried out they were not rendered liable to be defeated by saving clauses and the reservation of a dispensing power to the Crown.

Parliamentary control over legislation.

Nevertheless the process of legislation took much less time to acquire its modern aspect than did the connection of the executive and the legislature. It was not till the end of the seventeenth century that party government

<sup>1</sup> Stubbs, Const. Hist. ii. 559.

and the relation of ministers to Parliament began to assume something of their present form; but by the end of the fifteenth statutes had assumed the form which they still retain, and as early as the reign of Henry VI the framing of laws was undertaken and conducted by the Houses, and the King had ceased to do more than express a formal acceptance or rejection of the measure submitted to him.

By this means the mediaeval Parliament had acquired an effective control over legislation, while its control over the action of the Crown, or of the ministers of the Crown, remained uncertain and at best intermittent. But we must not therefore suppose that the King was free to do as he would either in the determination of general policy or in the details of administration, or that the only check upon him was the need of a reference to Parliament when money was wanted.

### *The Feudal King.*

Contractual character of Feudalism.

Feudal royalty did not possess the indelible sacredness which came to be attached to the kingly office in the seventeenth century. The liabilities of allegiance might be renounced as they were in the case of Edward II, or the right to allegiance resigned as it was by Richard II. Feudalism was based upon contract, and a hopeless failure in performance of his part by the King was held to discharge his subjects from their corresponding duties<sup>1</sup>.

The Council a check upon the Crown.

But there was a stronger curb upon the action of the King than this last appeal to the mutual undertakings of sovereign and subject. The executive was not the King but the King in Council, and the Council were the great officers of state. Although it might be difficult for Parliament to keep an adequate control over the King's choice of ministers, or over the action of the ministers whom he chose, such ministers were themselves powerful representatives of two estates of the realm, the baronage and the clergy. The nobles and bishops who, for the most part,

<sup>1</sup> I have described the position of the feudal king and the limitations on his action in *The Crown*, ch. i. sect. iii.

composed the Council could influence the royal policy in other ways than by their knowledge of the business of State. The nobles by their great estates and local influence could treat with the King on an independent footing; the bishops could speak for the clergy, who were taxed separately from the laity, and often on a larger scale. The Council therefore was a counterpoise to the power of the Crown, unless the King was a man of exceptional vigour and capacity, who could seize a policy which should be popular with the Commons and carry it out with a skill and firmness which would secure the obedience of the Council. Nor did the Council hesitate to control the action of the Crown in details. The history of the royal seals shows the care taken that no official expression of the royal pleasure should be unauthenticated by an officer of State.

If we look for an habitual check on the prerogative we find it in the Council rather than in Parliament.

### *The Reformation and the Tudor Monarchy.*

Under the Tudor monarchy the character of kingship was changed. The Wars of the Roses left the baronage reduced alike in numbers and in power, the Commons exhausted and anxious only for a rule strong enough to give them peace, the Crown rich with the forfeited lands of those barons who had taken the wrong side in the dynastic quarrels of York and Lancaster. The Church was the only great power in the State which could cope with the Crown; and the reform of the Church, whether it was to take place from without or from within, was now imminent.

The Reformation in England was the result of many conflicting currents of interest. But we must look at the matter from the point of view of Parliamentary history. By the dissolution of the monasteries the Church lost much besides wealth; it lost social influence, for the monasteries had been the great educational centres and the great dispensers of charitable relief; it lost political

Sources of  
Tudor  
power.

Political  
effect of  
the Refor-  
mation.



influence when the mitred abbots ceased to occupy the place they had filled in the House of Lords.

Thus many things combined to enhance the power of the Crown. The destruction of the baronage not only freed the King from men who might control his policy and action, but enabled him to fill the great offices of state with new men. The Council was changed in composition; the great nobles bore a small proportion to the officials on their promotion; it was changed in its mode of working, split into departments with special business assigned to them; it ceased to be a check upon royal power; it became instead a formidable instrument in the hands of the Crown. The breach with Rome placed the King at the head of the national Church, and the spoils of the monasteries gave him an immense accession of wealth.

Mainten-  
ance of  
constitu-  
tional  
forms by  
the  
Tudors.

And yet in other ways the growing importance of Parliament was noticeable. The two great Tudor monarchs, Henry VIII and Elizabeth, showed their statesmanship in nothing more conspicuously than in their acceptance of all the forms of the constitution. When Henry VIII obtained for his Proclamations the force of law, and was permitted to devise the Crown by will, these extraordinary powers were in each case conferred by Parliament and in statutory form. When Elizabeth desired to control the growing interest of the House of Commons in public affairs she packed the House with subservient members, representing small boroughs upon which she had conferred the franchise in order that they might return persons who would be under the influence of the court or its ministers. The Tudors were content with the substance of power, and left to Parliament everything but the reality of control over legislation and policy.

#### *The issues between the Stuarts and Parliament.*

Disregard  
of them  
by the  
Stuarts.

But this expedient for harmonizing the wishes of the House of Commons with the action of the executive is of itself an indication that a new struggle was beginning on the old ground. The Commons had begun to demand a

voice in the general policy of the country, and to criticize the action of the executive in modern fashion. The first two Stuarts chafed at constitutional forms, and were incapable of a generous acceptance of a policy which they disliked.

The practical issue between the Crown and the Commons came to this, that the Crown claimed to tax without consent of Parliament, and to administer justice without the forms of law. Both parties appealed to the letter of old statutes, and neither seemed to see that with the change of times, and after the long lapse of political interest under the Tudors, the mediaeval constitution needed to be restated, or even recast, if King and Commons were to resume their old place and their old relations in political life.

The Petition of Right was the first attempt to restate the rules of constitutional liberty on the lines of the Great Charter, but in defiance of its provisions Charles tried to dispense with Parliament in matters of taxation, and with the Courts of Law in matters of criminal justice. The Star Chamber, which exercised the coercive judicial powers of the Privy Council, had once been a useful means of bringing great offenders within the reach of the law by the strong arm of the executive. It now became, as indeed had always been possible, an instrument of political and ecclesiastical tyranny, wherewith the King was enabled to dispense with the forms of law where they were inconvenient, and to get the course of criminal justice into his hands.

Want of money brought the King back to Parliament at last, and the first acts of the Long Parliament were to sweep away the civil and criminal jurisdiction of the Privy Council, and to close every avenue against the raising of money by the Crown without the consent of the Commons. But the executive and the representative parts of the constitution had by this time drifted too far apart, and the monarchical policy of the first Stuarts ended in the catastrophe of the Civil War and the premature reforms of the Commonwealth.

*Relations of Crown and Parliament, 1660-1688.*

The Restoration did not give back what the Long Parliament had taken away—the criminal jurisdiction of the Privy Council; nor did it revive what the Long Parliament had set at rest—the right of the Crown to raise money, whether by direct or by indirect taxation, without Parliamentary grant. The executive was weakened for the purposes of conflict with the legislature, but nothing was done to bring the ministers of the Crown into closer relation with the power which was fast becoming paramount in the constitution, the House of Commons.

In the reigns of the last two Stuarts one may summarize the relations of Parliament and the Crown somewhat as follows.

Revenues  
of the  
Crown in  
1660.

The King could set up no claim to raise money without consent of Parliament: he possessed a revenue roughly calculated at £1,250,000 a year arising from the Crown lands and the proceeds of certain duties; he employed such ministers as he pleased, subject to the risk of their being impeached by the House of Commons if they and the House came to hopeless variance; and he conducted the business of government in concert with an inner circle of the Privy Council, consisting of such persons as he might think likely to promote the dispatch or enliven the progress of business. Any increase in the productive power of the sources of the revenue accrued to the King, who might to that extent become independent of Parliament.

Appropri-  
ation of  
supplies.

Any increase in the liabilities of government if it exceeded the ordinary revenue had to be met by a subsidy, or extraordinary grant, from the Commons, and such grants were for the first time in the reign of Charles II *appropriated* to the specific purposes for which they were made; that is to say, their use was limited to such purposes, and the money granted was not issued except under precautions that it should be so used. The Commons drew closer their control upon the action of the executive, but the periodical catastrophes of Charles the Second's reign—the exile of Clarendon, the impeachment of Danby—show how easy it

was for a minister and a House of Commons to drift so far apart that their disputes could not be settled by a mere change of men.

The abortive Privy Council scheme of Sir William Temple in 1679 showed some consciousness of the risk arising from the lack of correspondence between ministers and the Commons. The attempt to create an executive which should represent all classes and opinions could hardly have been expected to succeed, but it was something that the constitutional problem should have been recognized, though the solution was inadequate.

Attempt to harmonize executive and legislature.

Taxation in Parliament and the free administration of justice had been secured by the Long Parliament; the last of the Stuarts revived an earlier claim of the Crown to independent legislative powers. The final struggle arose out of the attempt of James II to annul, of his own authority, statutes which had been thought essential to the security of the Protestant religion. The issue between the first Stuart and his subjects turned on the security of person and property, the right of the King to tax without Parliament and imprison without legal sentence. The issue between the last Stuart and his subjects turned on the King's right to suspend the law at his pleasure and by his individual act. The offer of the crown to William and Mary, their acceptance of it, and the codification in the Bill of Rights of the limitations on the royal prerogative, mark the beginning of the modern constitution.

The dispensing power.

### *The Modern Constitution.*

The Bill of Rights is, on the face of it, a summary of constitutional rules: incidentally it settles some large and disputed questions of principle. In opposition to the doctrine that the Crown was a piece of real property which could never be without an owner, it declares the throne vacant. In opposition to the doctrine that the succession to the throne was a matter of divine indefeasible hereditary right, it regulates that succession. In opposi-

1688.

The Bill of Rights, how far a code.

tion to the doctrine of passive obedience, it affixes conditions to the tenure of the Crown.

The Bill of Rights is perhaps the nearest approach to a constitutional code which we possess, but it does not profess to be a written constitution. It merely states the points which had been from time to time in issue between the Crown and its subjects since the reign of Edward I, and on all points it declares in favour of the nation and against the Crown.

The Act of Settlement, which provided that the judges should no longer hold office at the pleasure of the Crown, and so took the control of justice from the hands of the King, was a fitting supplement to the constitutional provisions of the Bill of Rights.

Altered  
conception  
of royalty.

This summary of constitutional rules, setting at rest matters which had long been a source of difference, represents the legal result of the Revolution. The process by which the Crown was offered to William and Mary by the representatives of the estates of the realm is evidence of an altered conception of royalty which has practically determined the development of constitutional usage since 1688. It is worth considering how this conception of royalty has gradually been arrived at.

Mediaeval  
royalty.

Feudalism, which linked political power with the holding of land, had found the King a tribal chief, had made him the ultimate landlord of every man, and had turned sovereignty into a piece of real property, the rights to which were regulated by the feudal land-law. The practice of Commendation, where fealty was to be rendered on one side and protection on the other, gave to feudalism that element of personal loyalty which made treason the unpardonable sin of the Middle Ages. At the head of the feudal hierarchy, the lord of kings was the Emperor, but his shadowy lordship lost all practical meaning when the kingdoms of Europe became definite and compact; and the Reformation, which broke up the unity of Western Christendom, destroyed for ever the feudal conception of society, secular and spiritual, tending upwards to the Emperor and the Pope. And as the dependence of the

King upon an earthly power was thus exploded, kingship obtained a higher place than it had occupied as a link in the feudal chain. For the connection of sovereignty with property was still assumed, and the personal allegiance of feudalism remained, and when men sought for some theory of political duty they found it in the conception of Divine Right. The King held the kingdom as property, his subjects owed him their fealty, and his tenure was of God.

And this theory of Divine Right grew into definite shape in opposition to a new conception of kingship. When, after the Reformation and with the rise of Puritanism, men began to regard the King rather as the official exponent of the wishes and aims of his people, the opponents of this view sought in the divine right of kings a basis of sovereignty and a theory of political duty which seemed to them surer than the convenience of a nation, or the need of having some outward embodiment of the State. Representative royalty.

The act of the Convention Parliament which gave the crown to William and Mary was the recognition of the official and representative duties of the Crown of England. Whether, with the utilitarians, we say that government exists for the common good, or with Locke, that it exists for the purpose of securing to us natural rights, or with Hobbes, that it exists for the restraint of lawlessness and the protection of men from their own inclinations to rapine and revenge, we come to the same conclusion—that the State exists for our advantage, that the King is a part of the State, that he, like the rest of the State machinery, is not there of right except in so far as he fulfils his functions. Result of new idea of royalty.

This practical view of the relations of the Crown and people had immediate effects.

The King was leader of the armed force of the nation, but the feudal levy was now extinct, the national levy or militia was inadequate, and the Bill of Rights had declared the maintenance of a standing army in time of peace without consent of Parliament to be contrary to law. Apart from this general proposition the maintenance of discipline The Mutiny Act.

in a standing army involves a departure from the ordinary course of law. The Commons were determined that such a power should not pass out of their control, and every year, for a year, they legalize the existence of a standing army and make provision for its discipline.

The appropriation of supplies.

Again, the Crown had conducted the business of government on the resources supplied by the proceeds of Crown lands and of taxes settled on the King for life. If the revenue was in excess of the needs of government the King could do as he liked with the balance; if it was deficient the King asked the Commons to make good the deficiency. But it was left to the King to conduct the entire financial business of state from year to year. After the Revolution this was changed. The King was not entrusted with the payment of all the charges of government; he was placed upon an allowance called the Civil List, calculated to meet the cost of the royal household and of the civil departments. The House of Commons took over the naval and military expenditure, and annually voted and paid the sums required. They thereby acquired a power of constantly reviewing the conduct of the King's ministers.

Dependence of ministers on Parliament.

But most important of all was the new relation in which the ministers of the Crown stood towards Parliament. With the increased control which the House of Commons acquired over the business of government came the necessity that the King's ministers should be able to work in harmony with a majority of the House. The King might choose his servants, but the House of Commons might make it difficult, if not impossible, for them to carry on the business of government.

### *Cabinet and Party Government.*

The Cabinet.

And this newly acquired power of the House of Commons did more than limit the King's choice of ministers; it was incompatible with the discussion of matters of general policy by the Privy Council. The Privy Council was too large a body, and of too various political opinions, to act together

or to guide its action by the wishes of a Parliamentary majority.

Already the general policy of the country had come to be discussed by a small group chosen by the King from among the officers of state, and this had arisen partly from convenience, partly also from the dislike of Charles II to the formalities of a full meeting of the Council, and of William III to the communication of his policy to more than a few trusted statesmen.

1. A committee of heads of departments.

It remained that this inner circle of advisers, made up of the chiefs of the various departments of government, should consist of persons of the same way of thinking in politics, and that this way should accord with the opinion, for the time, of the majority in the House of Commons. The necessity for this became clear, as Sunderland showed to William III, so soon as the increase in the power of the Commons became realized.

2. United in holding the political opinions of the majority in the Commons.

As early as the beginning of the eighteenth century Cabinet and party government existed in a rudimentary form, and thus the House of Commons obtained the control which mediaeval Parliaments had sought in vain over the selection of the executive and the policy of the country. But this power was nearly sacrificed to a fear lest the presence in the House of a body of ministers and placemen should affect the independence of members. A clause in the Act of Settlement excluded from the House of Commons all who held offices or places of profit under the Crown. Happily this clause was repealed before it came into operation; and the parties in the House of Commons have gradually acquired the power of indicating, by a process which is somewhat indefinable in its action, though perfectly clear in its results, the ministers to whom they are willing that the conduct of affairs should be entrusted.

3. Not severed from House of Commons.

There were certain principles which needed to be established before Cabinet government, as we understand it, could assume even a rudimentary form. First among these was the recognition of the Cabinet as the advisers of the Crown and the connection of the Cabinet with the political party dominant for the time in Parliament. Cabinets, or

Cabinet superseded Privy Council.



small groups of ministers specially favoured with the confidence of the Crown, had existed throughout the reigns of the last two Stuarts, of William and of Anne; but the supersession of the Council by the Cabinet as a deliberative body for purposes of executive action did not take place all at once; and it was only realized by degrees that this body must be of one mind on the great political issues of the time <sup>1</sup>.

Disuse  
of royal  
presence.

Another principle was that the King should act *through* and not *with* his Cabinet. The disuse of the royal presence at Cabinet meetings dates from the accession of George I, who probably found it disagreeable to attend discussions which he could not understand; and the absence of the King, while it enhanced the power of the ministers and their leader, completed the severance of the Cabinet from the Council. It ceased to be a meeting of the Lords of the Privy Council; it became a meeting of 'the King's servants,' leaders of the party in power. Whatever may be the individual liabilities of the members of the Cabinet as heads of departments or members of the Privy Council, the collective Cabinet has no legal existence or legal liability. It is summoned by the Prime Minister, also unknown to the law <sup>2</sup>, through his private secretary; and its proceedings are unrecorded, save in communications to the Crown in the form of Cabinet minutes or reports to the King by the Prime Minister of the transactions of a Cabinet meeting.

Joint  
responsi-  
bility of  
ministers.

Another principle, and this was of slow growth, was that of the joint responsibility of ministers. If a body of ministers stand or fall together, the influence of the Crown upon the working of government is obviously much diminished, and that of the Commons is increased. If the King should be dissatisfied with the working of a particular department he cannot now, as the King could

<sup>1</sup> In *The Crown*, Part i, ch. ii, sect. iii, I have worked out, in some detail, the early history of the Cabinet. It certainly did not grow out of any known Committee of the Privy Council, but was a small body of advisers for general purposes. See *The Crown*, Part i, pp. 80-7.

<sup>2</sup> This statement must be qualified by the recognition of the Prime Minister, as entitled to a certain precedence, by the Royal Warrant of 2nd Dec. 1905.

and did during the eighteenth century, dismiss the minister responsible for the department unless he has lost the confidence of his colleagues as well as of the Crown; to do so would bring about the retirement of the entire ministry. The Crown has to deal with a body of men who stand or fall together, because they represent common interests and the opinions of a party. They can only remain ministers while a majority of the House of Commons is willing to support their policy, and is not willing to support any other. They are collectively the nominees of that majority, or rather, of the majority of the electors who on the last occasion of a general election chose the party who should hold office until the time came for the country to reconsider its decision. They have, it is true, been summoned, and continue, to hold office by the pleasure of the Crown, but it is to the majority of the House of Commons, and not to the will of the Crown, that they look to enable them to retain their power. The dismissal of one minister, unless with the concurrence of his colleagues, would be regarded as an attack upon the policy which all represent.

*The United Kingdom and the Empire.*

So far I have traced the development of Parliamentary institutions in England alone. It has to be borne in mind that the Acts of Union with Scotland and Ireland were treaties by which in each case two independent Parliaments merged their identity in a new Parliament upon certain terms as to representation in the two Houses; treaties by which two States, one enjoying complete independence, the other a legislative independence of England, were formed into a United Kingdom. The Acts of Union.

And this United Kingdom of Great Britain and Ireland, the terms of whose union and the conditions of whose government must be studied by the constitutional lawyer, has accumulated around itself a group of colonies and dependencies, some the result of conquest, some of settlement, very variously constituted in themselves and stand- Constitution of the colonies and their connection with the United Kingdom.

ing in various relations to the central government. The self-governing colony, the Crown colony, and the protectorate present a variety of type sufficient to satisfy the most eager curiosity as to the working of a great Imperial system. Our task is not done until we have made out the nature of the connection of England, Scotland, and Ireland, and the working of the central executive in the United Kingdom and throughout the Empire. But in this volume we have to deal with the legislative sovereign of our Empire, the King in Parliament.

## CHAPTER III

### THE MEETING OF PARLIAMENT

I HAVE endeavoured to define what I mean by the words 'Constitutional Law'; and have given a brief sketch of the mode in which Parliament obtained its place in our constitution. As I propose to divide the subject of my treatise into two parts—Parliament and the Crown, or the Legislature and the Executive—we will now deal with Parliament.

Topics  
dealt  
with.

Parlia-  
ment  
and the  
Crown.

First, we must get Parliament together and regard it as a whole, in respect of its summons, the setting in motion of its business, its adjournment, prorogation, and dissolution.

The meet-  
ing of Par-  
liament.

Secondly, we must consider the constituent parts of the two Houses of Parliament, the Commons and the Lords; the process by which the members of either House attain to membership; the privileges which such membership confers upon the individuals, or which each House collectively enjoys.

Constitu-  
tion and  
privileges  
of the  
Houses.

Thirdly, we must trace the process of legislation as effected by the joint action of the two Houses, or by the action of the House of Commons under the Parliament Act.

Legisla-  
tion.

Fourthly, we must consider the part played by the Crown and its ministers in making laws and in communicating with the two Houses.

The  
Crown in  
Parlia-  
ment.

Fifthly, we must note as a matter of history, in order that we may understand the present relations of the Houses of Parliament and the Crown, the attempts made by the Crown, in the past, to interfere with or to influence the action of the Houses; and the encroachment by one branch of the Legislature upon the action of the rest.

Inter-  
ference of  
executive  
with legis-  
lature.

Lastly, we must deal with certain functions of Parliament, other than legislative, which may be conveniently included in the term 'the High Court of Parliament.'

The High  
Court of  
Parlia-  
ment.

### §1. *Parties to Legislation.*

The  
parties to  
legisla-  
tion.

Ordinarily there are three parties to legislation—the King, the Lords, and the Commons. Under the exceptional circumstances which may arise under the provisions of the Parliament Act, legislation is effected by the King and Commons alone. For if the Lords fail to pass a Money Bill within one month after it is sent up to that House; or if they refuse in three successive sessions to pass a Public Bill, other than a Money Bill, and if two years have elapsed between the dates at which it was read a second time in the first, and a third time in the last, of those sessions, then the Bill may be presented to the King for the royal assent though the Lords have not concurred in passing it. So the enacting clause of a statute usually runs thus:—

‘Be it enacted by the King’s most excellent Majesty, by and with the advice and consent of the Lords Spiritual and Temporal, and Commons, in this present Parliament assembled, and by the authority of the same, as follows:’

But it may also run thus:—

‘Be it enacted by the King’s most excellent Majesty, by and with the advice and consent of the Commons in this present Parliament assembled, in accordance with the provisions of the Parliament Act, 1911, and by the authority of the same, as follows:’

The process of legislation, and the part played by the Crown in making laws, will be dealt with later. Laws are made by an assembled Parliament, and by the concurrence of one House or both the Houses of which Parliament consists, and of the Crown.

Though Parliament may by statute delegate legislative powers, under such conditions as it chooses to impose, to a department of Government or to some public body, the power so given is limited by the terms of the statute and proceeds from the supreme legislature.

The duties  
of Parlia-  
ment.

The most striking attribute of Parliament is its legislative sovereignty, but the bodies of which Parliament consists are not summoned mainly, or even primarily, to make laws; legislation is only one of various functions

which Parliament discharges. Members of either House may discuss all matters of national or imperial concern, and criticize the conduct of ministers; either House collectively may address the Crown on matters of general policy, may institute inquiries, in the public interest, into the conduct of persons or public bodies; while in the last resort Parliament may bring to justice a great political offender. But before we come to the functions of Parliament we must first ascertain who are invited to attend upon this Parliament, for what purposes and in what manner it is brought together, how its business is set in motion, and how it may be dismissed for a time or dissolved for good.

§ 2. *Who are summoned to Parliament.*

We need not consider the Assembly of the Wise under the Saxon monarchy, nor the Council of the Magnates under the Norman kings; it is enough that in times when the business of State was rather the declaration and enforcement of custom than the enactment of new laws or the changing of old ones, and when the King discharged in person the executive duties of government, he acted in concert with a body which, whether the qualification for membership was wisdom or property, advised, and to some extent controlled, his action.

The Council of Magnates was expanded, upon occasion, into the Commune Concilium Regni, or the entirety of the tenants-in-chief, and the first formal provision for the summons of this assembly is to be found in the Magna Charta of 1215. In mode and object of summons we note some approach to the later Parliament.

In the twelfth section of the Charter, John promises that he will not levy scutage or aid other than the three recognized feudal aids, 'nisi per commune consilium regni.' And in the fourteenth section, the process of holding this Common Council is described. Archbishops, bishops, abbots, earls, and greater barons are to be summoned individually, 'sigillatim per literas nostras.' The tenants-in-chief are to be summoned 'in generali' by writs addressed to the sheriffs. The writs in all cases are to name the day and

The assembly of tenants-in-chief, Magna Charta.

as provided in Magna Charta.

place of meeting, and the cause of summons. Forty days' notice, at least, is to be given, and on the day named the Council is to transact the business for which it has been summoned, whether or no it is attended by all to whom the summons is addressed.

How far this clause of Magna Charta expressed and formulated existing practice is not clear. It was omitted from subsequent confirmations of the Charter, and it may have been omitted as unnecessary because it was merely declaratory; or as unpopular with the barons who procured these confirmations because it was too stringent; or, lastly, it may have been omitted from no special design, but because other matters were more pressing at the time of the confirmations.

But though the clause exhibits, in the two modes of summons, the germ of the distinction between Lords and Commons, yet the assembly for which it provides differs obviously from the later Parliament.

How far  
different  
from the  
Parlia-  
ment of  
Edw. I.

That assembly was not representative. The clergy are not summoned as an estate, nor are the Commons; the inferior clergy, the towns, and those freeholders of the shires who held of *mesne* lords have no place in the *commune concilium* of the Angevin kings.

Nor was it summoned for the purposes of a Parliament: the *commune concilium* was not called to advise the King generally, but merely to assent to the imposition of taxes, and of taxes of a special sort.

In fact the representative system had already begun, and the provisions of 1215 described an assembly of a type which was already passing away. The constitution of the shire moot or county court had always been representative, and the practice of representation had been applied to the kingdom at large in 1213. For to a council held in that year had been summoned 'four discreet men' of each county, to be sent up by the shire moot without reference to their tenure.

Shire representation, as opposed to representation of the tenants-in-chief, does not recur until 1254, when the regents of the kingdom (Henry III being in Gascony) summoned four knights from each shire, and representatives of the clergy

from each diocese<sup>1</sup>. The towns were first represented in the famous Parliament of Simon de Montfort; and then through various assemblies, more or less completely representative of the various interests of the country, we reach 'the great and model Parliament,' summoned by Edward I in 1295<sup>2</sup>.

This Parliament, both as to causes of summons, and as to constitution, may be justly regarded as the ideal of a representative assembly for the age in which it existed. It was, in fact, to the kingdom what the full county court was to the shire, an assemblage in which every class and every interest had a place. And so it was intended to be by the great King who had the skill and courage to adapt the organization of the county court to the requirements of the kingdom. 'What touches all,' so ran the writ, 'should be by all approved.'

The model Parliament, and who were summoned.

To this Parliament was summoned by special writ the archbishops, bishops, and abbots, and to the writ of summons of the two former was attached the *praemunientes* clause directing the attendance of the heads of cathedral chapters, of the archdeacons, and of proctors to represent the chapters and the parochial clergy. Special writs of summons were directed to seven earls and forty-one barons. And writs were addressed to the sheriffs bidding them cause to be elected two knights of each shire, two citizens of each city, two burgesses of each borough.

Summons of estate of clergy;

Special baronage; commons.

Thus we get a representation of the three estates of the realm, the clergy, baronage, and commons, and their respective duties are defined in the writs which summon them. The clergy and baronage are summoned 'ad tractandum ordinandum et faciendum,' the commons 'ad faciendum quod tunc de communi concilio ordinabitur.'

Parliament, then, was in its origin, and is still in law,

<sup>1</sup> Stubbs, Const. Hist. ii. 68. The choice of two knights for each shire in 1220 in full county court for the assessment of a carucage illustrates the increased use of representation, though for assessment and not for grant. Stubbs, Select Charters, 352.

<sup>2</sup> Ibid. 128.



a representative assembly of the three estates of the realm ; for all three are still summoned to Parliament.

The clergy  
drop out

But, in fact, the attendance of the clergy was always given reluctantly ; they preferred to meet in their provincial convocations : there they granted taxes for their own estate, and the kings, since they got what they wanted from these assemblies, ceased to press for the attendance of the clergy in Parliament. They attended the Parliament

from legis-  
lation,

of 1322 by which the sources of legislative power were defined, and yet they do not fall within the number of persons or bodies in whom that power was declared to reside. There is no evidence of their attendance from the end of the fourteenth century onward. In 1664 the mode of granting money by subsidies to meet the extraordinary needs of State was abandoned<sup>1</sup>, and the clergy ceased to offer separate subsidies to the Crown. In 1663, for the last time, they granted separate subsidies ; in 1664 the Act which imposes the taxation of the year includes the clergy, but saves their right to tax themselves<sup>2</sup> ; and henceforth no distinction is made in taxing clergy and laity, though the clergy are still summoned in the writs addressed to archbishops and bishops at the commencement of every Parliament. The change in the mode of taxing the clergy was not made with any general assent of Convocation ; it was the result of an informal agreement between Archbishop Sheldon and Lord Chancellor Clarendon. The clergy acquired in return, by tacit consent, what they had not before enjoyed, the right to vote for knights of the shires, as freeholders, in respect of their glebes<sup>3</sup>.

from  
taxation.

The history of the earlier period explains the forms of to-day.

Survival  
of early  
constitu-  
tion of  
Parlia-  
ment.

The ancient Council of the King passed into the House of Lords, and carried with it certain privileges and duties attributable to its earlier stage of existence. It is not

<sup>1</sup> See vol. ii. p. 317 (ed. 2).

<sup>2</sup> 15 Car. II, c. 10 ; 16 & 17 Car. II, c. 1. s. 36.

<sup>3</sup> See as to the right of the clergy to vote, Commons' Journals, 9th May, 1624, 3rd November, 1641 ; Hatsell Precedents, vol. ii. p. 10 and note. The right was questioned as late as 1696. See Commons' Journals, 15th December, 1696.

as a representation of the baronage but as members of the *magnum concilium* that the Peers are the hereditary counsellors of the Crown, and in their judicial capacity form an ultimate court of appeal. It is because they were once members of the *magnum concilium* that the judges are now summoned to advise, though not to sit as Peers of Parliament. The clergy are still summoned as an estate of the realm, though for centuries their summons has been a mere form. And the connection of the representation of the Commons with the county court and the organization of the shire is still indicated by the part which the sheriff takes in county elections, while, down to the year 1872, such elections still took place in the county court, and the identity of the member and the powers conferred on him were testified by indentures to which the sheriff and the men of the county were parties.

We have now glanced as briefly as may be at the historical beginnings of Parliament, so as to learn what a Parliament is. It is an assemblage of the three estates of the realm, which one of the estates persistently declines to attend. It consists, therefore, of the baronage and commons summoned by the Crown.

### § 3. *Objects of Summons.*

We must now ask for what purposes Parliament is summoned, and in what manner. Objects of summons :

The King, when he summoned a Parliament at the beginning of our Parliamentary history, had two distinct objects in view, neither of which would have been adequately attained without a representation of the estates as complete as was possible at that time. He wanted money, and he wanted to know what his people thought of his policy. It was for this reason that the writs to the sheriffs desire that the representatives of the commons may have ample power, 'ita quod pro defectu huiusmodi potestatis negotium infectum non remaneat.' Labour would be thrown away if the representatives granted an aid which their constituents repudiated. It was for this reason, too, that opinion.

the Commons were consulted on questions of general administration and of peace and war. The King wanted to commit them to a policy which might prove expensive; but the Commons, though prepared to offer criticism and even advice, where advice would not compromise them, declined to take over the responsibilities of the executive<sup>1</sup>.

At the  
present  
day :

financial ;

The objects of summons at the present time are more complex. The Commons have entire control over the finances of the country: the revenues which accrue to the Crown, and can be dealt with independently of Parliament, would hardly carry on the business of government for a day. For a considerable part of the revenue depends on annual grant, but very little can be used without consent of Parliament; while Parliament appropriates, in every session, to the services for which it is required, the money which is placed, as it comes from the tax-payer, to the credit of the Government account at the Bank of England. Without such appropriation the money cannot be legally expended.

legisla-  
tive;

And the need of legislation is now constant. Some Acts of Parliament though necessary, are temporary and need to be renewed by annual enactment. This may be because they are experimental, or because, as in the case of the Army Act, it is expedient thus to limit the power given to the executive. Fresh legislation is incessantly demanded, and whereas mediaeval legislation, where it was not simply declaratory of custom, was scanty, and, to judge from the preambles of statutes, timid and even apologetic, modern legislation is restless, bold, and almost inquisitorial in its dealings with the daily concerns of life.

Nor does Parliament meet only to grant and appropriate supplies or to make laws. The discussion of matters of national importance, and the criticism of the action of ministers, the conflict of party, are the matters which in the public mind give an interest to the meeting of Parliament.

but, in  
form, de-  
liberative.

The King when he calls a new Parliament makes no mention of the financial or legislative duties which that

<sup>1</sup> Stubbs, Const. Hist. iii. 603.

Parliament is summoned to discharge. He calls it, 'being desirous and resolved as soon as may be to meet his people, and to have their advice in Parliament.' It is in fact for purposes of discussion primarily that Parliament is summoned. Its legislative activity has developed, since the form of the Royal Proclamation which calls it has become settled by custom.

#### § 4. *Forms of Summons.*

The existence of Parliament in modern times is kept as nearly continuous as possible, and hence the dissolution of one Parliament and the calling of another are effected by the same Royal Proclamation issued by the King on the advice of the Privy Council under the Great Seal. The Proclamation discharges the existing Parliament from its duties of attendance, declares the desire of the Crown to have the advice of its people, and the royal will and pleasure to call a new Parliament. It further announces an Order addressed by the Crown in Council to the Chancellors of Great Britain and Ireland to issue the necessary writs, and states that this Proclamation is to be their authority for so doing.

Until recent times it was the practice for a warrant under the sign manual to be given by the Crown to the Chancellor to issue the necessary writs. This has ceased to be done: an Order in Council is made directing that writs shall be issued, but, as a matter of fact, the Royal Proclamation is treated by the Crown Office in Chancery as the authority for the issue. These writs I will presently describe.

It may be convenient to set out here the form of Proclamation above described and of the Order in Council following upon it:—

#### *By the King.*

#### A PROCLAMATION FOR DISSOLVING THE PRESENT PARLIAMENT AND DECLARING THE CALLING OF ANOTHER.

EDWARD R.—Whereas We have thought fit, by and with the advice of Our Privy Council, to dissolve this present Parlia-

ment, which stands prorogued to      day, the      day of  
next, We do for that end publish this Our Royal Proclamation, and do hereby dissolve the said Parliament accordingly ; and the Lords Spiritual and Temporal, and the Knights, Citizens, and Burgesses, and the Commissioners for shires and burghs, of the House of Commons are discharged from their meeting and attendance on the said      day, the      day of  
next ; and We, being desirous and resolved, as soon as may be, to meet Our people, and to have their advice in Parliament, do hereby make known to all Our loving subjects Our Royal will and pleasure to call a new Parliament ; and do hereby further declare, that, with the advice of Our Privy Council, We have given order that Our Chancellor of that part of Our United Kingdom called Great Britain, and Our Chancellor of Ireland, do, respectively upon notice thereof, forthwith issue Our writs in due form, and according to law, for calling a new Parliament ; and We do hereby also, by this Our Royal Proclamation under Our Great Seal of Our United Kingdom, require writs forthwith to be issued accordingly by Our said Chancellors respectively, for causing the Lords Spiritual and Temporal and Commons, who are to serve in the said Parliament, to be duly returned to, and to give their attendance in, Our said Parliament ; which writs are to be returnable on      day, the      day of      next. Given at Our Court at Windsor, this      day of      , in the year of our Lord 19      , and in the      year of Our Reign. God save the King.

#### Order in Council for the Issue of Writs.

At the Court at Windsor, the      day of      , 19      .

Present, the King's Most Excellent Majesty in Council.

His Majesty having been this day pleased by His Royal Proclamation to dissolve the present Parliament and to declare the calling of another, is hereby further pleased, by and with the advice of his Privy Council, to order that the Right Honourable the Lord High Chancellor of that part of the United Kingdom called Great Britain, and the Right Honourable the Lord Chancellor of Ireland, do respectively, and upon notice of this His Majesty's order, forthwith cause writs to be issued in due form and according to law for the calling of

a new Parliament, to meet at the city of Westminster ; which writs are to be returnable on       day, the       day of       ,  
19 .

The writs were returnable, according to the provisions of Magna Charta, within forty days of their issue ; this period was extended after the union with Scotland to fifty days, and has been reduced, in view of the greater ease of communication, by an Act of the present reign, <sup>15 Vict. c. 23.</sup> to thirty-five days.

The writs issued from the Crown Office are addressed to five different classes of persons : to the temporal peers <sup>Five</sup> of England, to the spiritual peers of England, to the <sup>classes</sup> twenty-eight temporal peers of Ireland, to the judges of <sup>sum-</sup> the High Court of Justice, the Attorney- and Solicitor- <sup>moned.</sup> General, and to the returning officers of places entitled to elect members to serve in Parliament.

The writs are in the following forms :—

*Writ of Summons to a Temporal Peer of England.*

Edward by the grace of God of the United Kingdom of Great Britain and Ireland and of the British Dominions beyond the Seas King, Defender of the Faith, to Our ——— Greeting. <sup>Writ to Temporal Peer.</sup>  
Whereas by the advice and consent of Our Council for certain arduous and urgent affairs concerning Us, the State and defence of Our said United Kingdom and the Church, We have ordered a certain Parliament to be holden at Our city of Westminster on the       day of       next ensuing, and there to treat and have conference with the Prelates, Great Men, and Peers of our Realm. We strictly enjoining command you *upon the faith and allegiance by which you are bound to Us* that the weightiness of the said affairs and imminent perils considered (waiving all excuses) you be at the said day and place personally present with Us and with the said Prelates, Great Men, and Peers, to treat and give your council upon the affairs aforesaid. And this as you regard Us and Our honour and the safety and defence of the said United Kingdom and Church and dispatch of the said affairs in no wise do you omit. Witness Ourselves at Westminster the       day of       in the       year of our Reign.

To ———. A writ of summons to Parliament the       day of  
next.

*Writ of Summons to a Spiritual Peer (with  
Praemunientes clause).*

Writ to  
Spiritual  
Peer.

Edward by the grace of God of the United Kingdom of Great Britain and Ireland and of the British Dominions beyond the Seas King, Defender of the Faith, to — Greeting. Whereas by the advice and assent of Our Council for certain arduous and urgent affairs concerning Us the State and defence of Our said United Kingdom and the Church, We have ordered a certain Parliament to be holden at Our city of Westminster on the       day of       next ensuing, and there to treat and have conference with the Prelates, Great Men, and Peers of Our Realm, We strictly enjoining command you *upon the faith and love by which you are bound to Us* that the weightiness of the said affairs and imminent perils considered (waiving all excuses) you be at the said day and place personally present with Us and with the said Prelates, Great Men, and Peers, to treat and give your council upon the affairs aforesaid. And this as you regard Us and Our honour and the safety and defence of the said United Kingdom and Church and dispatch of the said affairs in nowise do you omit. Forewarning the Dean and Chapter of your Church of — and the Archdeacons and all the Clergy of your Diocese that they the said Dean and Archdeacon in their proper persons and the said Chapter by one and the said Clergy by two meet Proctors severally, having full and sufficient authority from them the said Chapter and Clergy, at the said day and place to be personally present to consent to those things which then and there by the Common Council of Our said United Kingdom (by the favour of the Divine Clemency) shall happen to be ordained. Witness Ourself at Westminster the       day of       in the       year of our Reign.

Praemu-  
nientes  
clause.

To —. A writ of summons to Parliament, to be holden the       day of       next.

The writ of summons to an Irish Representative peer follows the form of the writ addressed to the peer of Great Britain, after first reciting the fact that the peer summoned had been duly elected in pursuance of the provisions of the Act of Union.

*Writ of attendance addressed to the Judges,  
and the Attorney- and Solicitor-General.<sup>1</sup>*

Edward, &c., to Our trusty and well beloved — Greeting. Writ to judge, &c.  
Whereas by the advice and assent of Our Council for certain arduous and urgent affairs concerning Us, the State and defence of Our said United Kingdom and the Church, We have ordered a certain Parliament to be holden at Our city of Westminster on the      day of      next ensuing and there to treat and have conference with the Prelates, Great Men, and Peers of Our Realm. We strictly enjoining command you that (waiving all excuses) you be at the said day and place personally present with Us and with the rest of Our Council to treat and give your advice upon the affairs aforesaid, and this in no wise do you omit.

Witness Ourselves at Westminster, &c.

*Writ addressed to the Sheriff or Returning Officer  
of a county or borough for the election of  
a member of the House of Commons.*

Edward by the grace of God of the United Kingdom of Great Britain and Ireland and of the British Dominions beyond the Seas King, Defender of the Faith, to — Greeting. Statutory writ to Sheriff.  
Whereas by the advice of Our Council We have ordered a Parliament to be holden at Westminster on the      day of      next, We command you that, notice of the time and place of election being first duly given, you do cause election to be made according to law of [one] member to serve in Parliament for —. And that you do cause the name of such member when so elected, whether he be present or absent, to be certified to Us in Our Chancery, without delay.

Witness Ourselves at Westminster the      day of      in the      year of Our Reign and in the year of our Lord One thousand nine hundred and      .

To —. A writ of a new election of — member for the      said —. 35 & 36  
Vict. c. 33.

As to these writs we may note the following points:—

1. Proclamations, writs of summons and attendance,

<sup>1</sup> Formerly a 'King's Serjeant' was appointed by letters patent from among the serjeants-at-law, and received a writ of attendance with the judges and law officers.



and writs for the election of members to serve in Parliament, are authenticated by the Great Seal. But in Great Britain the Great Seal is for these purposes represented by 'an impression to be taken in such manner, and of such size or sizes, on embossed paper, wax, wafer, or any other material' as a Committee of the Privy Council may from time to time prescribe<sup>1</sup>.

Scotch  
peers.

2. The Scotch representative peers do not receive a writ of summons; their election is made in pursuance of a separate Proclamation, in a manner which I will describe hereafter; it is certified by the Lord Clerk Register of Scotland to the clerk of the Crown in Chancery, and by him to the clerk of the House of Lords.

Irish  
peers.

3. The mode of election of the Irish representative peers will be dealt with hereafter.

Temporal  
and  
Spiritual  
peers.

4. The temporal peers are summoned as in the mediaeval writs 'on their faith and allegiance,' and the spiritual peers in like manner 'on their faith and love,' and in other respects the writs of to-day differ little if at all from those of four hundred years ago.

Praemu-  
nientes  
clause.

5. The Praemunientes clause by which the Bishop is instructed to summon the clergy of his diocese to be present and consent to that which Parliament may ordain still recognizes the position of the clergy as an estate of the realm, and it must be distinguished carefully from the summons to Convocation, an exclusively clerical assembly, of which more hereafter.

Judges'  
summons.

6. The Judges, and the Attorney- and Solicitor-General, are summoned, but in an inferior capacity. Their writs are writs 'of Attendance' not 'of Summons.' They are not invited to be present '*with* the said Prelates, Peers, and Great Men,' but '*with* Us and with the rest of Our Council to treat and give your advice.'

It is in virtue of this writ of attendance that the Judges are called upon to give their opinions on difficult

<sup>1</sup> This is done in pursuance of rules made under the provisions of the Crown Office Act, 1877. Commons' Papers, 1878 (87), lxiii. 177. Irish writs are still authenticated by a solid piece of wax bearing a portion of an impression of the Great Seal in use in Ireland.

points of law which come before the House of Lords as a Court of Appeal. But they do not come as Peers of Parliament, and recent procedure in the matter of their summons shows that it is regarded rather as an obligation than as a dignity.

For before the Judicature Act the summons, by long custom, was limited to the judges of the old Common Law courts, the Chief Justices and puisne judges of the Queen's Bench and Common Pleas, and the Chief Baron and Barons of the Exchequer.

Since the Judicature Act the summons is extended to all the judges of the High Court of Justice, and to the Lords Justices of Appeal. But this writ would not be issued to a judge who was entitled to be summoned as a temporal peer.

7. The writs addressed to returning officers for the election of members of the House of Commons must be delivered by the messenger of the Great Seal or his deputy to the General Post Office (except such as are addressed to the sheriffs of London and Middlesex), and must be dispatched free of charge, by post<sup>1</sup>. Dispatch  
of writs.

8. The writs are in a modern form provided by the Ballot Act of 1872. But the form of writ which was in use until that date, shows how near we still are to the constitutional forms of the middle ages, and indicates, more clearly than the abbreviated modern writ, the objects of summons.

*Writ addressed to the Sheriff of Middlesex*  
17th July, 1837.

Victoria by the grace of God of the United Kingdom of Great Britain and Ireland Queen, Defender of the Faith, to the Sheriff of the County of Middlesex, Greeting. Whereas by the advice and assent of our Council, for certain arduous and urgent affairs concerning Us, the State and defence of Our said United Kingdom and the Church, We have ordered a certain Parliament to be holden at Our city of Westminster on the 4th day of September next ensuing. *And there to treat and*

<sup>1</sup> 53 Geo. III, c. 89. This prevents a returning officer from sending for the writ in order to accelerate the nomination and poll.

*have conference with the Prelates, Great Men, and Peers of Our Realm, We command and strictly enjoin you (Proclamation hereof, and of the time and place of election being first duly made) for the said County two Knights of the most fit and discreet, girt with swords, and for the City of Westminster, in the same County, two Citizens, and for each of the Boroughs of the Tower Hamlets, Finsbury, and Marylebone, in the same County, two Burgesses of the most sufficient and discreet, freely and indifferently by those who at such election shall be present according to the form of the Statutes in that case made and provided, you cause to be elected; and the names of such Knights, Citizens, and Burgesses so to be elected, whether they be present or absent, you cause to be inserted in certain Indentures to be thereupon made between you and those who shall be present at such election, and then at the day and place aforesaid you cause to come in such manner that the said Knights for themselves, and the Commonalty of the same County, and the said Citizens and Burgesses for themselves, and the Commonalty of the said City and Boroughs respectively, may have from them full and sufficient power to do and consent to those things which then and there by the Common Council of Our said United Kingdom (by the blessing of God) shall happen to be ordained upon the aforesaid affairs, So that for want of such power or through an improvident election of the said Knights, Citizens, or Burgesses the aforesaid affairs may in no wise remain unfinished. Willing nevertheless that neither you nor any other Sheriff of Our said Kingdom be in any wise elected. And the election so made distinctly and openly under your seal and the seals of those who shall be present at such election, certify you to Us in Our Chancery, at the day and place aforesaid, remitting to Us one part of the aforesaid indentures annexed to these presents, together with this writ. Witness Ourselves at Westminster the 17th day of July in the 1st year of our reign.*

To the Sheriff of the County of Middlesex. Writ of election to Parliament to be holden the 11th day of September next.

The Sheriff thereupon issued precepts to the bailiff of the 'Liberty of the Dean and Chapter of the Collegiate Church of St. Peter at Westminster,' and to the Returning Officers of the boroughs, and the precepts were returned to him when the elections were duly made; the county

election took place in the county court, and the return was sent, together with the returns from the city and boroughs, to the Crown Office in Chancery.

These returns were in all cases accompanied by indentures, to which the Returning Officer and a number of electors were parties. These indentures were required by Acts of Henry IV and Henry VI<sup>1</sup>, and their object was to secure that the persons returned by the Sheriff were in truth the persons elected by the constituencies. They follow closely the terms of the writ, and the terms of the writ, being the same or nearly the same as in the early days of representation, are express in the requirement that the person returned should have full power to bind the constituency. The indenture therefore at first sight creates the impression that its main purpose was to constrain the electors to abide by the acts and promises of their representative done on their behalf. But in fact the object of the indenture, as may be seen from the statute which requires it, was to secure the identity of the person elected with the person returned.

These indentures are still in use in the University constituencies, for these are not governed by the Ballot Act, and voting takes place orally or by voting papers.

Thus much as to the mode in which a Parliament is summoned. We have next to see how it is brought together and its business set in motion.

### § 5. *The opening of Parliament.*

The Parliament meets on the day appointed in the Proclamation of summons. The Sovereign is not usually present at the opening of a new Parliament, but issues a commission under the Great Seal for that purpose. The Houses assemble in their respective chambers, and the Commons are summoned to the House of Lords. There the letters patent constituting a commission for the opening of Parliament are read, and the Lord Chancellor desires the Commons to choose a Speaker.

<sup>1</sup> 7 Hen. IV, c. 15 ; 23 Hen. VI, c. 14.

Of the Speaker we shall have more to say presently. It is enough here to note that he is not only chairman of the Commons for the purpose of maintaining order and declaring or interpreting the rules of the House, but also the spokesman and representative of the House for the purpose of communications made in its collective capacity to the Crown.

**Election of Speaker.**

The Commons retire to choose their Speaker, the formal business of the chair being, for the purposes of the election, discharged by the clerk of the House. On the election being made the Speaker takes the chair, and the mace, the symbol of his office, is laid before him on the table.

The House adjourns until the following day, and then the Speaker takes the chair until summoned by the officer of the Lords to the presence of the Lords Commissioners. He goes to the bar of the House of Lords with the members of the Commons, announces his election, and 'submits himself with all humility to his Majesty's gracious approbation.'

The Lord Chancellor expresses the approval by his Majesty of the choice of the Commons, and confirms him as Speaker. After this is done he demands the 'ancient and undoubted rights and privileges of the Commons.' These are granted, and the Speaker with the Commons returns to the Lower House.

There are two things to consider before we come to the declaration by the King of the objects of summons in the speech from the Throne.

**Evidence of membership.**

(a) The first is the evidence by which the members of the two Houses can establish their rights to membership.

(b) The second is the perfecting of the title to sit.

(a) In the Lords those who have received writs of summons present them at the table of the House, the roll of those entitled, as hereditary peers of England, to receive writs, being delivered by the Garter King at Arms. The title of the representative peers of Scotland is evidenced by a certificate delivered by the Clerk of the Crown<sup>1</sup> of a return made to him by the Lord Clerk Register of

<sup>1</sup> For an account of this officer, see Part ii. The Crown, p. 154.

Scotland. Garter King at Arms delivers at the table of the House a list of the Lords Temporal, and the list is ordered to lie upon the table. A new peer presents his patent to the Lord Chancellor at the Woolsack, and this, together with his writ of summons, is read by the clerk of the House.

In the Commons the clerk of the House receives from the clerk of the Crown a book containing a list of the returns made to the writs issued, and this is the sole evidence furnished to the House. The returns themselves are retained in the Crown Office during the continuance of a Parliament in case reference should be required to be made to them. After this they are transferred to the Record Office.

(b) The second is the perfecting of the title of a member Perfecting of title to sit. to discharge the duties of his office, and for this it is necessary in both Houses that an oath of allegiance should be taken or a declaration made to the same effect.

It had been customary for members of both Houses of The oath. Parliament to take the oath of allegiance from the year 1534 onwards, and the oath of supremacy from the year 1558.

The oath of supremacy was required to be taken by the Commons in the fifth year of Elizabeth, and the oath of 1562-3 allegiance in the seventh year of James I, but these oaths 1609-10 were taken before the Lord Steward sitting in the Court of Requests. It was not until the thirtieth year of Charles II that they were prescribed to be taken by both 1678 Houses and in Parliament. By an Act of that year the Lords and Commons in their respective Houses were to take and subscribe the oaths of allegiance and supremacy before they were entitled to sit and vote<sup>1</sup>. The form of Post, p. 90. the oath has undergone various changes. As provided by 31 & 32 Vict. c. 72, it runs thus:—

I — do swear that I will be faithful and bear true allegi- Its form.  
ance to her Majesty Queen Victoria her heirs and successors  
according to law. So help me God.

<sup>1</sup> The Statutes are 5 Eliz. c. 1. s. 16; 7 James I, c. 6; 30 Car. II, st. 2. c. 1.

But Acts have been passed from time to time for the relief of persons to whom the form of oath, or the taking of an oath, was objectionable: and finally, since 1888, the Oaths Act<sup>1</sup> enables any person to make affirmation in all cases wherein an oath is required, on stating either that he has no religious belief or that it is contrary to his religious belief to take an oath.

As regards the time of taking the oath: when a new Parliament meets, the Lords take the oath as soon as the Parliament has been opened; the Commons as soon as the Speaker has been approved by the Crown, and has himself taken the oath. On the election of a member during the continuance of a Parliament he is entitled to take the oath as soon as the certificate of his return has reached the Clerk of the House.

The time for taking the oath is in the House of Lords limited to the hours between 9 a.m. and 5 p.m. In the Commons it may be taken at any time of the day that a full House is sitting, and before it has entered upon the Orders of the day.

Result of  
failure to  
take it.

It should be noted that a failure to take the oath prevents a member of the House of Commons from sitting and voting as a member of the House, but that he is none the less a member as regards his constituency, and that he is for some purposes a member of the House of Commons. His seat is not vacant, and he is capable of discharging all the duties and enjoying all the rights of a member short of sitting within the bar of the House, taking part in its debates, and voting in its divisions. When the Houses are duly constituted by the completion of the forms described, Parliament is prepared to hear the causes for which it is summoned.

At the commencement of a session which is not also the commencement of a Parliament the proceedings relating to the election of a Speaker and the taking of the oath are not needed, and the Houses are at once informed of the causes of summons.

The King, if he meets Parliament in person, goes in state to

<sup>1</sup> 51 & 52 Vict. c. 46. s. 1.

the House of Lords, and takes his seat upon the throne; the Lord Chamberlain is bidden to desire the Usher of the Black Rod, the officer of the House, to *command* the attendance of the Commons. The Commons, with the Speaker at their head, come to the bar of the House of Lords, and the King reads his speech to the House, in which he informs them of the business to be laid before them.

When Parliament is opened by commission, the Lords Commissioners in like manner bid the officer of the House to *desire* the attendance of the Commons, and the speech is read by the Lord Chancellor acting under the commands of the Crown. The Houses adjourn, and when they re-assemble proceed to the consideration of the Speech from the Throne; but before doing so they assert their right to deal with other matters than those referred to in the speech, by reading a Bill for the first time *pro forma*. The speech is then read again in each House, and in each House it is moved that an address be made in answer.

To this address amendments may be moved, and thus the general policy of the Government, as indicated by the Speech from the Throne, is brought under discussion.

Each House, when its address has been agreed to, orders it to be presented to the King, but the formalities as to the mode of presentment need not be dealt with here<sup>1</sup>.

It may give more reality to the details of procedure if I set out extracts from the Journals of the Houses describing the forms of opening Parliament in the year 1906.

On the first assembling of the House of Lords<sup>2</sup>,

The Lord Chancellor acquainted the House, that it not being convenient for His Majesty to be personally present here this day, he has been pleased to cause a Commission under the Great Seal to be prepared in order to the holding of this Parliament.

The House adjourned during pleasure, to robe.

The House was resumed.

Then five of the Lords Commissioners, being in their robes,

<sup>1</sup> May, *Parliamentary Practice* (ed. 11), 175, and see *post*, p. 70.

<sup>2</sup> 138 *Lords' Journals*, 123.



Summons  
of Com-  
mons.

and seated on a form placed between the Throne and the Woolsack, the Lord Chancellor in the middle, with the Lord Privy Seal and the Earl Carrington on his right hand, and the Earl Beauchamp and the Lord Tweedmouth on his left, commanded the Gentleman Usher of the Black Rod to let the Commons know, 'the Lords Commissioners desire their immediate attendance in this House, to hear the Commission read.'

Who being come, with their Speaker ; the Lord Chancellor said—

'My Lords and Gentlemen,

Powers of  
Commis-  
sion.

'We are commanded by His Majesty to let you know, that it not being convenient for Him to be present here this day, in His Royal person, He hath thought fit, by Letters Patent under the Great Seal, to empower His Royal Highness the Prince of Wales and several Lords therein named to do all things, in His Majesty's name, which are to be done on His Majesty's part in this Parliament, and by Letters Patent will more fully appear.'

Then the said Letters Patent were read by the Clerk. \* \* \*

Then the Lord Chancellor said—

'My Lords and Gentlemen,

Direction  
to elect  
Speaker.

'We have it in command from His Majesty to let you know, that as soon as the members of both Houses shall be sworn, the causes of His Majesty's calling this Parliament will be declared to you ; and it being necessary a Speaker of the House of Commons should be first chosen, it is His Majesty's pleasure that you, gentlemen of the House of Commons, repair to the place where you are to sit, and there proceed to the choice of some proper person to be your Speaker ; and that you present such person whom you shall so choose, here, to-morrow, at twelve o'clock, for His Majesty's royal approbation.'

We will now change the scene to the House of Commons, to which the members of that House returned <sup>1</sup>.

Election of  
Speaker.

Sir Wilfrid Lawson, addressing himself to the Clerk (who, standing up, pointed to him and then sat down), proposed to the House, for their Speaker, the Right Honourable James William Lowther ; and moved, 'That the Right Honourable

<sup>1</sup> 161 Commons' Journals, 123.

James William Lowther do take the chair of this House as Speaker'; which motion was seconded by the Right Honourable Beilby Stuart-Wortley.

The House then calling unanimously Mr. James William Lowther to the chair, he stood up in his place, and expressed the sense he had of the honour proposed to be conferred upon him, and submitted himself to the House.

The House then having again unanimously called Mr. James William Lowther to the chair, he was taken out of his place by the said Sir Wilfrid Lawson and Mr. Stuart-Wortley, and conducted to the chair, and Mr. Speaker elect, standing on the upper step, expressed his sincere thanks to the House and his sense of the great honour which the House had been pleased to confer upon him, and sat down in the chair; and then the Mace (which before lay under the table) was laid upon the table.

Then Sir Henry Campbell-Bannerman, having congratulated Mr. Speaker elect, moved, 'That the House do now adjourn'; and Mr. Akers-Douglas having also congratulated Mr. Speaker elect, the House accordingly adjourned till tomorrow.

On the following day, the 14th of February, the Lords met, and five of the Lords Commissioners being seated as before again sent to the Commons to desire their immediate attendance in this House.

Who being come;

The Right Honourable James William Lowther said—

'My Lords,

'I have to acquaint your Lordships that in obedience to His Majesty's commands, His Majesty's most faithful Commons have, in the exercise of their undoubted rights and privileges, proceeded to the election of a Speaker, and that their choice has fallen upon myself. I now present myself at your Lordships' bar, and submit myself with all humility to His Majesty's gracious approbation.'

Then the Lord Chancellor said—

'Mr. Lowther,

'We are commanded to assure you that His Majesty is so Approval  
fully sensible of your zeal for the public service, and of your <sup>of</sup> Speaker.

ample sufficiency to execute the arduous duties which His faithful Commons have selected you to discharge, that he does most readily approve and confirm you as their Speaker.'

Then Mr. Speaker said—

'My Lords,

Demand  
of privi-  
leges.

'I submit myself with all humility and gratitude to His Majesty's most gracious commands. It is now my duty in the name and on behalf of the Commons of the United Kingdom, to lay claim by humble petition to His Majesty to all their ancient and undoubted rights and privileges, especially to freedom of speech in debate, to freedom from arrest<sup>1</sup>, and to free access to His Majesty when occasion shall require, and that the most favourable construction shall be put upon all their proceedings. With regard to myself I humbly pray that if in the discharge of my duties I shall inadvertently fall into any error, the blame may be imputed to myself alone, and not to His Majesty's faithful Commons.'

Then the Lord Chancellor said—

'Mr. Speaker,

'We have it further in command to inform you that His Majesty doth most readily confirm all the rights and privileges which have ever been granted to or conferred upon the Commons by any of His Royal Predecessors.

'With respect to yourself, Sir, although His Majesty is sensible that you stand in no need of such assurance, His Majesty will ever put the most favourable constructions upon your words and actions<sup>2</sup>.'

Then the Commons withdrew.

We will again follow them to their own House, whither being returned :—

Report of  
Speaker.

Mr. Speaker reported—That the House had been in the House of Peers, where His Majesty was pleased by His Majesty's Commissioners to approve of the choice the House had made of him to be their Speaker; and that he had in their name and on their behalf, by humble Petition to His Majesty, made claim to

<sup>1</sup> This privilege formerly extended to the *estates* and the *servants* of members. The claim for estates was abandoned by Mr. Speaker Denison in 1857, the claim for servants by Mr. Speaker Peel in 1892.

<sup>2</sup> 112 Lords' Journals, 126.

their ancient and undoubted Rights and Privileges, particularly to freedom from arrest and all molestation of their Persons; to freedom of Speech in Debate; to free access to His Majesty when occasion shall require; and that the most favourable construction should be put upon all their proceedings; which, he said, His Majesty, by His said Commissioners, had confirmed to them in as full and ample a manner as they have been heretofore granted and allowed by His Majesty, or any of His Royal Predecessors.

And then Mr. Speaker repeated his very respectful acknowledgments and grateful thanks to the House for the great honour they had done him.

Mr. Speaker then put the House in mind that the first thing to be done was to take and subscribe the oath required by law.

And thereupon Mr. Speaker, first alone, standing upon the upper step of the Chair, took and subscribed the oath. Taking of Oath.

Then several Members took and subscribed the oath, and several Members made and subscribed the Affirmation required by law.

And then the House adjourned till to-morrow<sup>1</sup>.

On the 19th of February, in the House of Lords,

His Majesty being seated on the Throne adorned with His Crown and Regal Ornaments, and attended by His Officers of State (the Lords being in their robes) commanded the Gentleman Usher of the Black Rod, through the Lord Great Chamberlain, to let the Commons know, 'It is His Majesty's pleasure they attend Him immediately in this House, who being come with their Speaker, His Majesty was pleased to speak as follows.'

The King then delivered his speech, after which His Majesty was pleased to retire.

The Commons withdrew to their House, transacted various matters of formal business, and read a first time the Clandestine Outlawries Bill, after which Speech from the Throne.  
Bill read a first time.

Mr. Speaker reported that the House had this day attended His Majesty at the House of Peers, when His Majesty was pleased to make a most gracious Speech from the Throne to both Houses of Parliament, of which Mr. Speaker said he

<sup>1</sup> 161 Com. Journ. 123.

had for greater accuracy obtained a copy which he read to the House<sup>1</sup>.

Address in  
answer.

The address as made in answer to the King's Speech in either House calls for no comment. When settled and approved the Lords ordered their address to be presented to His Majesty by 'the Lords with White Staves<sup>2</sup>;' the Commons' address was to be presented 'by such members of this House as are of His Majesty's most honourable Privy Council.'

### § 6. *Adjournment, Prorogation, Dissolution.*

We have now brought Parliament to the stage at which it is fully constituted, opened, and ready to transact business. The nature of this business and the mode in which it is transacted shall be dealt with later. But having brought our Parliament into existence, it is important to know how that existence can be terminated; having put it into a position to transact business, it is important to know how that business can be stopped.

A dissolution brings the existence of Parliament to an end; a prorogation brings the session of Parliament to an end; an adjournment brings about a cessation of the business of one or other House for a period of hours, days, or weeks.

Adjourn-  
ment.

The adjournment of either House takes place at its own discretion, unaffected by the proceedings of the other House. Business pending at the time of the adjournment is taken up at the point at which it dropped when the House meets again. The Crown cannot make either House adjourn: it has sometimes signified its pleasure that the Houses adjourn, but there is no reason why its pleasure should also be the pleasure of the Houses. The Crown has, however, a statutory power<sup>3</sup> to call upon Parliament to meet before the conclusion of an adjournment contemplated where both Houses stand adjourned for more than fourteen days. The power is

<sup>1</sup> 161 Com. Journ. 132.

<sup>2</sup> The lords who hold office in the royal household.

<sup>3</sup> 39 & 40 Geo. III, c. 14, amended by 33 & 34 Vict. c. 81.

exercised by Proclamation declaring that the Houses shall meet on a day not less than six days from the date of the Proclamation.

Prorogation takes place by the exercise of the royal prerogative; it ends the session of both Houses simultaneously, and terminates all pending business. A bill which has passed through some stages, but is not ripe for the royal assent at the date of prorogation, must begin at the earliest stage when Parliament is summoned again, and opened by a speech from the throne. Prorogation is effected at the end of a session either by the King in person or by Royal Commission. In the former case the King's commands are announced, in his presence, to both Houses, by the Speaker of the House of Lords; in the latter a like announcement is made by the Commissioners.

The prorogation is to a specified date, but it may be necessary either to postpone or to accelerate the meeting of Parliament.

When prorogation postpones the meeting of a new Parliament to a later date than that for which it had been summoned, a Writ was formerly addressed to both Houses. When the Crown extends the prorogation of a Parliament which has already met, it was the practice to issue a Commission for the purpose. The writ or commission was read by the Chancellor to a clerk who represented the House of Commons. Since 1867<sup>1</sup> a postponement as well as an acceleration of the meeting of Parliament may be ordered by proclamation.

The power to accelerate the meeting of a Parliament which has been prorogued is given by statute: an Act of 1797 empowered the King to advance the meeting from the date to which prorogation had taken place to one not earlier than fourteen days from the date of the proclamation, and this period is reduced to six days by an Act of 1870<sup>2</sup>.

The form of a proclamation which merely postpones the meeting of Parliament runs thus:—

<sup>1</sup> 30 & 31 Vict. c. 81.

<sup>2</sup> 37 Geo. III, c. 127, and 33 & 34 Vict. c. 81.

EDWARD R.,

Whereas Our Parliament stands prorogued to the       day  
of       instant ; We, by and with the advice of Our Privy  
Council, hereby issue Our Royal Proclamation, and publish and  
declare that the said Parliament be further prorogued to  
     , the       day of       , One thousand nine  
hundred and       .

Given at Our Court at       this       day of       in the year  
of our Lord 19       and in the       year of Our reign.

*God save the King.*

When the date fixed is the date at which the session is  
intended to commence, the following words are added :—

And We do hereby further, with the advice aforesaid, declare  
Our royal will and pleasure that the said Parliament shall on  
the said       the       th day of       19       , assemble and be  
holden for the dispatch of divers urgent and important affairs :  
and the Lords spiritual and temporal, and the knights citizens  
and burgesses and the Commissioners for shires and burghs of  
the House of Commons are hereby required to give their  
attendance accordingly on the said       day of       19       .

Dissolu-  
tion.

By pre-  
rogative.

The dissolution of a Parliament may be effected either  
by an exercise of the royal prerogative, or by efflux of  
time. When the King exercises his prerogative he may do  
so in person, should Parliament be sitting, or if not in per-  
son by Royal Commission. If Parliament is not sitting, but  
stands prorogued, it is dissolved by proclamation in the  
manner described on an earlier page.

The usual practice, if Parliament is sitting, is for the  
King to prorogue it first and then issue a proclamation in  
the form set out on a preceding page.

Thus on the 24th of March, 1880, Parliament was pro-  
rogued by Royal Commission until the 13th of April, and  
on the evening of the same day a proclamation was issued  
discharging the members of the two Houses from attendance  
on the 13th of April, and dissolving the Parliament.

By efflux  
of time.

Efflux of time dissolves Parliament. This was not so  
until 1694. The King could keep a Parliament in existence  
as long as he pleased, and Charles II retained for seventeen

years the Parliament called at his accession. Events showed that a House of Commons, if it was kept in being for so long a time after its election, might cease to represent the people ; and that if the House depended wholly on the Crown for the continuance of its existence it might be too ready to favour the policy of the Court. For this and other reasons the Bill for Triennial Parliaments was passed by both Houses in 1693, but William withheld his assent until the Bill came before him again in the following year. It then became law, and so until the beginning of the reign of George I the law stood. Within six months of the death of Anne—that is, early in the year 1715—the Parliament which had been in existence at the date of her death was dissolved ; but when the new Parliament had been in existence little more than a year, it became clear that the operation of the Triennial Act might produce serious inconvenience, if not actual disaster. The succession to the Crown was in dispute, rebellion was still smouldering in the north, and there was risk of an invasion. Under these circumstances, and not perhaps from any theoretical preference for septennial over triennial elections, Parliament prolonged its own existence to a term of seven years. This was done by the Septennial Act, 1 Geo. I, st. 2, c. 38 ; and was the rule until the passing of the Parliament Act, 1 & 2 Geo. V, c. 13. Parliament, if not sooner dissolved by royal prerogative, will henceforth expire by the efflux of time at the end of five years<sup>1</sup>.

The  
Triennial  
Act.

The Sep-  
tennial  
Act.

The Par-  
liament  
Act.

Until 1867 the existence of Parliament was affected by the demise of the Crown. The King summoned the estates of the realm, by writ, to confer with him ; when he died the invitation lapsed, and the Parliament was dissolved. The theory was not unreasonable, though the practice was inconvenient. For whatever may have been the law or the practice of early Teutonic societies as to the assemblage of the people, our representative institutions took their origin from the King's invitation to the three estates to appear in person, or by their representatives,

Effect of  
demise of  
Crown.

<sup>1</sup> A Bill which extends the duration of Parliament is excepted from the provisions of the Parliament Act and needs the assent of the Lords.



to advise, assent, or enact. It was natural that the invitation should lapse and the assembly disperse when he who summoned it had died; for the mediæval Parliaments came together, not so much because the people wanted to take part in public affairs, as because the King wanted money and information; and the theory that Parliament owed its existence to the King's writ was true to this extent, that the writ was the recognized means by which the three estates could be brought together.

Duration  
of Parlia-  
ment un-  
affected.

The inconvenience was met by a series of statutes. 7 & 8 Will. III, c. 15, enacted that Parliament should last for six months after the demise of the Crown, if not sooner dissolved by the new sovereign. This rule was made applicable after the Acts of Union with Scotland and with Ireland to Parliaments of Great Britain, and of the United Kingdom. The Representation of the People Act, 1867, makes the *duration* of a Parliament independent of the demise of the Crown<sup>1</sup>.

30 & 31  
Vict.  
c. 102,  
s. 51.

Demise  
during  
dissolu-  
tion,

But a demise of the Crown may occur subsequent to a dissolution, but before the day appointed for the meeting of Parliament. In such a case, by 37 Geo. III, c. 127, s. 4, the old Parliament is to convene and sit for six months, unless sooner prorogued or dissolved by the new sovereign. If the demise took place on or after the day named in the writs of summons for assembling the new Parliament, then the new Parliament was to meet under similar conditions. In this last case the Act of 1867 removes the limit of six months to the existence of the new Parliament.

proroga-  
tion, or  
adjourn-  
ment.

Lastly, a demise of the Crown may take place when a Parliament is in being, but is prorogued or adjourned. In such a case by 6 Anne, c. 41, s. 5, Parliament is to meet at once and without summons.

<sup>1</sup> The Act of 1867 deals only with the Representation of the People in England and Wales. But s. 51 provides that 'a Parliament in being shall not be dissolved or determined by a demise of the Crown' and is of a general character. There can be no partial dissolution of Parliament, and the provision extends to the Scotch and Irish constituencies. See the answer given by Sir R. Finlay to a question on this subject on February 19, 1901. Hansard, 4th Series, vol. lxxxix, p. 484.

Occasion might arise when 37 Geo. III, c. 127 would be of use in filling a gap left by the Act of 1867, which does not provide for the interval between a dissolution and the meeting of the new Parliament. But this curious result might follow—that at the close of a general election which has effected a complete change in the balance of parties, the old House of Commons, largely composed of lately rejected candidates, would resume its place and keep it until a fresh dissolution. Even now there is no provision for the remote possibility that a King might die after a dissolution and before the writs were issued.

The inconveniences to which the doctrine while it prevailed might give rise may best be illustrated in the case of the flight of James II, when the country was left without a King, and with no means of satisfying the legal requirements of form for summoning a Parliament.

Incon-  
veniences  
of the  
theory.

The Prince of Orange summoned the peers, such members of the last three Parliaments of Charles II as happened to be in London, and some citizens; by their advice he issued letters, not in the form of writs, but of the same purport, addressed to the Lords Spiritual and Temporal, being Protestants, to the Coroners, or in their default to the Clerks of the Peace of the counties, to the Vice-Chancellors of the Universities, and the chief Magistrates of the towns, summoning a Convention. When at the request of this Convention William and Mary had accepted the crown and all the elements of a legislature were present, a Bill was passed which turned the Convention into a Parliament. It was dissolved at the end of the year, and its acts were declared to be valid by the next Parliament.

It is interesting to consider how much of all the procedure which I have just described is law, and how much is custom. I will include under the term 'law' not only statute law, but that which is sometimes called the law of Parliament, a set of rules which are really part of the common law; and under the term 'custom' those conven-

tions a departure from which would not affect the validity of any parliamentary proceedings or touch any public or private right.

How  
much  
of this  
chapter is  
Statute  
Law :

Statute law determines the number and indicates the mode of election of the representative peers of Scotland and Ireland, it determines the number of the spiritual peers and the number and status of the Lords of Appeal. It provides a form of writ to be addressed to the returning officers of counties and towns. It fixes the form of oath to be taken or declaration made, and the penalty for non-observance of this rule. It determines the duration of Parliament subject to the prerogative right of the Crown to dissolve, and it has abolished the common law rule as to the effect of the demise of the Crown upon the existence of Parliament.

how much  
is Com-  
mon Law :

Common law governs all that relates to the prerogative of the Crown; its right to summon Parliament and to summon it in the form of proclamation; to open, prorogue, and dissolve it, and to do so either in person or by Commission<sup>1</sup>.

The whole of the rights of the Peerage, except in so far as they are touched by Statute, are matter of Common Law, and these include the right of summons, and of summons in a certain form.

The existence of the privileges of the House of Commons (for we are not here concerned with their nature and extent) is also a part of the law of the land, although the form is used of asking and receiving them by favour of the Crown.

how much  
is Custom.

From these rules, by which rights and liabilities public and private may be affected, we must distinguish conventions and formalities which are legally immaterial. The mode of electing a Speaker could be altered at pleasure by the House of Commons; the approval of the Speaker-

<sup>1</sup> The statutory and the practical limits to the right and power of the Crown to conduct the business of the country without a Parliament will come to be dealt with later. The statutory limits are too wide to be worth mentioning here, and the practical limits too narrow to be easily explained till I have set out the process of legislation in respect of the appropriation of supply.

elect by the King is not seemingly a legal necessity<sup>1</sup>; the claim of privilege made by the Speaker might probably be omitted without affecting the recognition of parliamentary privilege by the Courts of law. The speech from the Throne setting forth the causes of summons may be necessary to put in motion the business of the Houses, but the addresses in answer are non-essential forms: for Parliament is not limited in legislation or discussion by the topics set forth from the throne, and each House is at pains to show its independence of those topics by reading a Bill for the first time before entering upon the consideration of the King's speech. The procedure of either House is matter for its own consideration, though incidentally the effect of changes in the order of business and the rules of debate may be of far-reaching importance.

<sup>1</sup> Sir E. May cites three cases of Speakers who acted as such without the royal approval; they occurred in the Convention Parliament which restored Charles II, in that which elected William III and Mary, and on one occasion during the insanity of George III in 1789. May, *Parliamentary Practice* (ed. 10), 154.

## CHAPTER IV

### THE HOUSE OF COMMONS

WE have dealt so far with the mode in which a Parliament is brought into existence, its business set in motion, its session terminated by a prorogation, or its existence by a dissolution. We come now to deal in detail with the three constituent elements of Parliament, the Crown, the Lords, and the Commons. It is convenient to take these in reverse order. The Commons, though not the most ancient, are the most important part of the Legislature, and involve more points for consideration, for we must treat not only of the qualifications of members, but of the qualifications of those who elect them, and of the form and manner of a Parliamentary election, as well as of the privileges of the House and of its members.

We have then here four topics: (1) who may be chosen for the House of Commons; (2) who may choose; (3) how they may choose; (4) what are the special privileges possessed by the House of Commons collectively, or by its members individually.

#### SECTION I

##### WHO MAY BE CHOSEN

**Disqualifications for House of Commons.** First, then, we must consider who may be chosen to serve in the House of Commons, or rather who are disqualified for membership by some incapacity, whether inherent, as in the case of an infant or lunatic, or acquired by profession or office, or incurred by felony, bankruptcy, or corruption.

**Infancy.** § 1. Infants are disqualified by the law of Parliament according to Sir Edward Coke, but the rule was not unfrequently broken<sup>1</sup> until the disqualification was made

<sup>1</sup> 'Many under the age of 21 years sit here by connivency, but if questioned would be put out'; 1 Com. Journ. 681; and see Hatsell, ii. 6.

statutory by 7 & 8 Will. III, c. 25, s. 8. It was applied to the Scotch members by the Act of Union with Scotland, and to members returned for Irish constituencies by 4 Geo. IV, c. 55, s. 74.

There have been cases since the passing of 7 & 8 Will. III, c. 25, in which a minor has been elected and has taken his seat without objection. Charles James Fox was returned, took his seat, and spoke while yet under age<sup>1</sup>, and Lord John Russell was returned a month before attaining his majority<sup>2</sup>. But there are no instances of such an infringement of the law since the passing of the Reform Bill of 1832.

§ 2. Lunacy or idiocy is a disqualification at Common Law, and, under certain conditions, by Statute<sup>3</sup>. Unsoundness of mind.

The history of the law on this subject may be collected from the report<sup>4</sup> of a Committee appointed to inquire into the case of Mr. Alcock in 1811.

Cases were not unusual, in times when a seat in the Commons was not so much an object of ambition as it now is, of members asking the House to relieve them from their duties on the ground of sickness or other infirmity. A further reason for such requests in the case of ill-health would seem to be that office was not a disqualification before the beginning of the eighteenth century; consequently a member could not vacate his seat by accepting the stewardship of the Chiltern Hundreds or other nominal office under the Crown<sup>5</sup>. But the House would not declare a seat vacant on such grounds, unless it was satisfied that the malady was incurable, nor would it interfere in more

<sup>1</sup> Russell, *Life and Times of C. J. Fox*, i. 10.

<sup>2</sup> Walpole, *Life of Lord John Russell*, i. 70.

<sup>3</sup> 49 Vict. c. 16.

<sup>4</sup> 66 Com. Journ. 687.

<sup>5</sup> In 1604 the borough of Dorchester petitioned that one of its members, Matthew Chubbe, might be relieved from his duties on the ground of bodily infirmity. The burgesses acknowledge that Mr. Chubbe did at the time of his election 'intreat us that he might be spared therein, offeringe to some other to be chosen five pounds towards his charges to serve therein.' They beg that 'he may not seem contemptuous by his absence, that it will please you to dismiase the saide Chubbe and to graunt a writ for the election of another.' It does not appear that this petition was granted. Oldfield, *Representative Hist. of Great Britain*, iii. 346.

**Insanity.** recent times except in such a malady as insanity, which would make the request and acceptance of the Chiltern Hundreds impossible.

In the case of Mr. Alcock<sup>1</sup> his constituents petitioned the House complaining that the insanity of their member deprived them of his services. He had been found a lunatic upon commission, and was in confinement. A committee was appointed, which, after taking evidence and searching for precedents, reported that his case was not so hopeless of cure as to justify the House in declaring the seat vacant.

In the more recent case of Mr. Stewart, attention was called, as a matter of privilege, to the fact that he had attended the House and voted in a division while under medical treatment for insanity as a certified lunatic. A motion for a committee to inquire into the circumstances of the case was negatived<sup>2</sup>.

The disqualification of a member on the ground of insanity might thus have been brought before the House in one of two ways: by petition from the constituency which is deprived of the services of its member, if the member is in confinement: or by a question of privilege being raised if a person certified to be of unsound mind should take part in the business of the House.

But a third and more effectual way of dealing with the matter is provided by 49 & 50 Vict. c. 16. Any authority concerned in the committal or reception of a member into any house or place as a lunatic must certify the same, as soon as may be, to the Speaker. The Speaker must obtain a report from specified authorities in lunacy, at once, and again after an interval of six months. If then the member is still of unsound mind the two reports must be laid on the table of the House, and the seat is then vacated.

**Aliens.**

§ 8. Aliens are incapable of sitting in Parliament both by common law and by statute.

Previous to the year 1700 an alien could acquire capacity for election by becoming naturalized; but 12 & 13 Will. III, c. 2, disqualified all persons born out of the king's dominions, even though naturalized or made denizens, unless they had

<sup>1</sup> 66 Com. Journ. 226.

<sup>2</sup> Hansard, vol. clxii, p. 1941.

been born of English parents. The Naturalization Act, 1870<sup>1</sup>, excepts political capacity (together with the right to own the whole or any part of a British ship) from the general concession which it makes to aliens of equal rights with natural-born British subjects. But the same Act (s. 7) enables an alien to acquire by naturalization the political rights and obligations of a British subject, and thus to qualify for Parliament.

§ 4. A peerage is a disqualification<sup>2</sup>. An English peer *Peers* may not sit in the House of Commons, nor may a Scotch peer, although he be not one of the representative peers of Scotland.

But an Irish peer may sit for any county or borough of Great Britain so long as he is not one of the twenty-eight representatives of the Irish peerage in the House of Lords<sup>3</sup>.

The sons of English peers have been eligible since an order made by the House on the 21st January, 1549, but the eldest sons of Scotch peers, not having been eligible to the Scotch Parliament, were held to be ineligible to the Parliament of Great Britain<sup>4</sup>. Their disability was removed by the Scotch Reform Bill of 1832, 2 & 3 Will. IV, c. 65, s. 37.

§ 5. Clergy of the Established Church and ministers of *Clergy* the Church of Scotland were disqualified in 1801<sup>5</sup>, and clergy of the Roman Catholic Church in 1829<sup>6</sup>.

<sup>1</sup> 33 & 34 Vict. c. 14, s. 2.

<sup>2</sup> It has been contended that a peer of the United Kingdom is not disqualified as such, and that until he has received a writ of summons as a Lord of Parliament he may sit in the House of Commons. In 1895 this point was raised by Lord Wolmer, member for West Edinburgh, on succeeding to the Earldom of Selborne; but the House, upon receiving a report from a Select Committee that Lord Wolmer had succeeded to a peerage of the United Kingdom, at once directed that a new writ should be issued. *Hansard*, 4th Series, xxxiii. 1058, 1728.

A Select Committee, appointed in 1894, to inquire into the vacating of seats reported that the House usually waited for proof of succession to a peerage by one of its members, such proof being furnished by the issue of the writ, but that if there was any delay in applying for the writ the House could ascertain the fact and act on such evidence as it thought sufficient. *Commons' Papers*, 1895 (272).

<sup>3</sup> 39 & 40 Geo. III, c. 67, art. 4.

<sup>4</sup> *Hatsell*, ii. 12.

<sup>5</sup> 41 Geo. III, c. 63.

<sup>6</sup> 10 Geo. IV, c. 7, s. 9.



Until 1801 the capacity of the clergy to be elected to Parliament was a matter of doubt. In that year the question was raised by the election of the Rev. J. Horne Tooke for the borough of Old Sarum. On inquiry it seemed that the authorities were not clear<sup>1</sup>: in 1785 a committee of the House had decided in favour of the eligibility of a person in deacon's orders, and elections already made were therefore excepted from the operation of the Act, and Mr. Horne Tooke was allowed to retain his seat.

Unless divested of orders.

The Clerical Disabilities Act of 1870<sup>2</sup> makes it possible for the clergy of the Church of England, whether priests or deacons, to divest themselves of their orders, and thereby to free themselves from this disqualification.

Office:

§ 6. Office of various kinds is a disqualification at common law or by statute.

(a) at Common law, Sheriffs,

Sheriffs appear to have been excluded generally by the terms of the old form of writ, which directs that 'neither you nor any other sheriff of our said kingdom be in any-wise elected.' But the restriction was in practice confined to the county for which the sheriff held office, so that the sheriff of Hampshire was held eligible to sit for the borough of Southampton, which was a county of itself<sup>3</sup>; it was extended by a resolution of the House, passed in the case of the borough of Thetford<sup>4</sup>, so as to exclude any officer of a borough to whom the writ or precept might be directed.

The disqualification of the sheriff was narrowed by 16 & 17 Vict. c. 68, s. 1, by which writs for cities and boroughs are no longer addressed to the sheriff of the county in which they are situated, but directly to their returning officers; one may now say shortly that at Common Law no returning officer in England or Ireland may sit for the place where he is bidden to cause an election to be made, and that the Scotch Reform Act of 1832<sup>5</sup> enforces the same rule in Scotland.

Judges;

The Judges of the three Common Law courts were

<sup>1</sup> 35 Parl. Hist. 1349.

<sup>2</sup> 33 & 34 Vict. c. 91.

<sup>3</sup> 4 Douglas, 87.

<sup>4</sup> 9 Com. Journ. 725.

<sup>5</sup> 2 & 3 Will. IV, c. 65, s. 36.

declared to be disqualified by a resolution of the House in 1605, they being 'attendants as Judges in the Upper House.' The provisions of the Judicature Act have taken <sup>(b) by Statute.</sup> the place of this rule <sup>1</sup>.

The history of the statutory disqualifications is voluminous and intricate. They begin soon after the Revolution, when the strength and irresponsibility of the House of Commons made the Crown as anxious to obtain some influence over its members as the House was to exclude persons who held office at pleasure of the Crown.

Commissioners of Stamps and of Excise were excluded by Acts of 1694 and 1699, and in 1700 came the sweeping provision in the Act of Settlement that 'no person who has an office or a place of profit under the King shall be capable of serving as a member of the House of Commons.'

Fortunately this clause in the Act of Settlement was repealed, before it could take effect, by 4 Anne, c. 8, s. 28. <sup>The Act of Anne.</sup> Two years later was passed the statute which forms the groundwork of the present law upon the subject.

6 Anne, c. 7 (41 in revised statutes), s. 24, enacts firstly <sup>New office.</sup> that no one shall be capable of being elected who has accepted from the Crown any *new* office created since the 25th October, 1705; secondly, that the holders of certain specified offices are incapable of election; and thirdly, it extends the incapacity to persons having pensions from the Crown during pleasure.

S. 25 enacts that the acceptance of any office of profit <sup>Old office.</sup> under the Crown by a member of the House of Commons shall avoid his election, but that he may be re-elected. This section must be construed to refer to *old* offices, otherwise it would repeal a part of s. 24.

S. 27 excepts from the operation of the statute com- <sup>Commissions in army and navy.</sup> missions in the army and navy.

Since the Act of Anne many statutes have been passed subjecting old or new offices to the total disqualification of s. 24, or the partial disqualification of s. 25. I have endeavoured to summarize the disqualifying statutes in

<sup>1</sup> 38 & 39 Vict. c. 77, s. 5.

an Appendix to this chapter, but I will confine myself in the text to a general statement of the law.

It is of some importance to know what constitutes acceptance; and we may regard it as now settled that acceptance of office takes place, so as to vacate a seat, when overt expression is given of the intention to accept an offer made by the proper authority<sup>1</sup>. But office held under the Crown does not always disqualify the holder for a seat in the House, and we may divide offices into groups, having regard to the extent or the existence of the disqualification.

(a) Offices  
which  
disqualify.

(a) The first group comprises those offices the acceptance of which is wholly incompatible with a seat in the House of Commons.

New  
offices  
under  
s. 24.

Such are *new* offices *under* the Crown within the meaning of the Act of Anne. Among these we must include all offices under the Crown created since 1705, and not specially exempted by statute. In the case of many new offices the disqualification has been expressly stated in the statute creating the office. A paid Charity Commissionership or a place on the Council of India would afford an instance of such offices.

Old offices  
under sub-  
sequent  
statutes.

Such are also certain *old* offices which fall under the 25th section, and which by subsequent statutes have been made to carry with them a total instead of a partial disqualification. Instances of such an office are afforded by the Mastership of the Rolls, or the offices about Court abolished in Burke's measure of economical reform with

<sup>1</sup> In 1864 Mr. Bruce accepted the office of President of the Committee of Council for Education, and it was questioned whether his seat was thereby vacated, as he had not then been sworn of the Privy Council. His acceptance was held to vacate the seat, and a new writ issued. The matter was important because Mr. Bruce was at that time an Under-Secretary of State, and by an oversight there were five Under-Secretaries in the House at the same time. The Act 27 & 28 Vict. c. 34 had not then been passed, so that the Under-Secretaries' seats were not affected by this incident, only they were under heavy penalties for sitting and voting. *Diary of Mr. Speaker Denison*, 155; *Hansard*, 3rd Ser., vol. clxxiv, p. 1237; *Report of Committee on Vacating Seats*, H. of C. 1894 (278), p. 80.

a provision that, if revived, they were to be regarded as *new offices* <sup>1</sup>.

A disability is created in the case of Secretaries and Under-Secretaries of State. The Act for the Government of India <sup>2</sup> provides that not more than four Principal and four Under-Secretaries may sit at the same time in the House of Commons: and by a later Act the election of any one who accepts the office of Principal or Under-Secretary in violation of this rule is void, and he is incapable of being elected so long as he holds his office and there are four Secretaries, or Under-Secretaries, as the case may be, sitting in the House.

If five Secretaries or Under-Secretaries of State are returned at a general election no one of these can sit and vote until by resignation of office or otherwise the number is reduced to four <sup>3</sup>.

(β) The second group comprises those offices the acceptance of which vacates a seat, but leaves the holder of the office re-eligible. (β) Offices which necessitate re-election.

Such are all *old* offices, that is, offices in existence before the 25th of October, 1705, except those which have been made an absolute disqualification by subsequent statutes. And such are the offices which by statutes subsequent to 6 Anne, c. 7 vacate a seat, but leave the holder re-eligible. Instances of such a provision may be found in the cases of the Presidents of the Boards created during the last thirty or forty years.

The holders of certain of these offices, set out in Schedule H of the Representation of the People Act, 1867 <sup>4</sup>, if transferred from one office to another in the same schedule are not required to offer themselves for re-election on the transfer.

(γ) There are certain offices the acceptance of which, though they are concerned with the administration of departments of State, does not either disqualify from sitting or necessitate re-election. (γ) Offices which do not disqualify.

<sup>1</sup> 22 Geo. III, c. 82.

<sup>2</sup> 27 & 28 Vict. c. 34.

<sup>3</sup> 21 & 22 Vict. c. 106.

<sup>4</sup> 30 & 31 Vict. c. 102.

An Act of 1741<sup>1</sup>, which added largely to the disqualifications created by the Act of Anne, expressly exempted the Secretaries of the Treasury, of the Chancellor of the Exchequer and of the Admiralty, the Under-Secretaries of the principal Secretaries of State, the Treasurer of the Navy, the Deputy Paymaster of the Army, and any persons holding office for life or during good behaviour.

This group has been extended from time to time with the increase in the number of the Principal Secretaries of State, and with the creation of Boards with a Parliamentary Secretary, appointed by the Board, and qualified for a seat in the House. Other offices, such as commissions in the militia<sup>2</sup> or in the reserve forces<sup>3</sup>, are exempted from disqualifications by statute.

Effects of  
disqualifi-  
cation.

The effects of disqualification vary. In some cases the election is simply avoided. In others a heavy penalty is imposed in addition if the office-holder has sat and voted. The law upon the subject is extremely intricate and perplexing; it might well be reduced into the compass of a single statute, for the principles involved are very simple, and this simplicity would not be lost if, with the cases to which they are applicable, they were crystallized in a code.

Its practi-  
cal objects.

It may be noted that the original ground for the disqualification of permanent officials is no longer the actual ground. It is not for fear of royal influence that Charity Commissioners or the permanent staff of the various departments of government are rendered incapable of sitting in the House of Commons. The need of securing the best men for the public service apart from political considerations, the converse need of a harmony between the head of a department and his subordinates, which could not exist if they were habitually opposed in debate, are now the acknowledged reasons for the exclusion of the various officials whom I have enumerated in a note. But these reasons, which make it desirable to exclude permanent members of the Civil Service from the House of Commons, do not apply to s. 25 of the Act of Anne, which requires

<sup>1</sup> 15 Geo. II, c. 22.    <sup>2</sup> 45 & 46 Vict. c. 49, s. 38.    <sup>3</sup> 7 Ed. VII, c. 9, s. 36.

the re-election of the Parliamentary heads of departments on their acceptance of office. The operation of this rule creates a needless and vexatious delay in the conduct of public business when a new ministry takes office, or a new member is introduced into a ministry.

§ 7. Persons who hold pensions at the pleasure of the Crown are disqualified by 6 Anne, c. 7 [41], s. 24. This disqualification was extended by 1 Geo. I, st. 2, c. 56, to pensioners of the Crown for terms of years whether held in the name of the pensioner or by another in trust for him; and the word 'pension' is construed by 22 Geo. III, c. 82, s. 30, to mean a grant of royal bounty repeated more than once in three years. The disqualification is removed in the case of civil service and diplomatic pensions by Acts of the last reign<sup>1</sup>.

§ 8. A person who directly or indirectly, himself or through the intervention of a trustee, holds or undertakes any contract or commission, for or on account of the public service, is incapable of being elected: if elected, the election is void, and there is a penalty of £500 imposed for every day in which a person labouring under such a disability shall sit and vote.

Government contracts.

This disqualification is created by 22 Geo. III, c. 45; it is made applicable to contracts with the Irish government and generally to Irish members by 41 Geo. III, c. 52, but does not extend to contributions or subscriptions to government loans<sup>2</sup>.

§ 9. A person attainted or adjudged guilty of treason or felony who has not received a pardon, or served his term of punishment, is incapable of election.

Convicted felons.

The common law on this subject is most clearly laid down in the case of John Mitchel, who, having been sentenced to transportation after conviction of treason-felony, escaped before his sentence had expired, and was subsequently elected for Tipperary. The House of Commons declared the seat vacant, there being no petition against his election. A new writ was issued, Mitchel stood again,

Mitchel's case.

<sup>1</sup> 32 & 33 Vict. c. 15; 32 & 33 Vict. c. 43, s. 17.

<sup>2</sup> 110 C. J. 325, Report, 1855 (401).

was elected, and upon a petition being lodged against his return, the Court held that votes given to him were thrown away, and that his opponent who claimed the seat was entitled to it<sup>1</sup>.

The ground on which the disqualification would seem to rest was that, as was argued by Sir John Holker in the debate in the House of Commons on the case of John Mitchel, a person convicted of treason or felony was not 'a fit and proper person' within the meaning of the old form of writ addressed to the Sheriff<sup>2</sup>. But it had always been held that one so convicted, if he had served his term of punishment or received a pardon in due form, was eligible, subject to some doubt as to the effect of a resolution of the House of Commons declaring him still to be ineligible.

All doubts on the subject are set at rest by 33 & 34 Vict. c. 23, s. 2, providing that any person 'hereafter convicted of treason or felony, for which he shall be sentenced to death, penal servitude, or any term of imprisonment with hard labour, or exceeding twelve months, shall become and (until he shall have suffered the punishment to which he shall be sentenced, or such other punishment as may by competent authority be substituted for the same, or shall receive a free pardon from Her Majesty) shall continue thenceforth incapable of being elected, or sitting, or voting as a member of either House of Parliament.'

A member convicted of misdemeanour, or sentenced to a shorter term of imprisonment, without hard labour, than twelve months, is not thereby disqualified. It rests with the House to deal with such cases, if necessary by expulsion, though expulsion does not disqualify or prevent the constituency from re-electing the expelled member.

Bank-  
ruptcy.

§ 10. A bankrupt<sup>3</sup> is disqualified for election, or, if elected, for sitting and voting. Unless the disqualification is removed by annulment of the adjudication in bankruptcy, or by a grant of discharge, accompanied by a certificate that the

<sup>1</sup> 9 I. R. C. L. 217.

<sup>2</sup> Speech of Sir John Holker (Solicitor-General), Hansard, vol. cccxii, p. 511. <sup>3</sup> 46 & 47 Vict. c. 52, ss. 32, 33 and 53 & 54 Vict. c. 71, s. 9.

bankruptcy was not caused by misconduct, the seat will fall vacant in six months from the date of adjudication.

§ 11. A candidate who is found at the trial of an election petition to have been guilty of corrupt practices within the meaning of 46 & 47 Vict. c. 51<sup>1</sup>, or on whose behalf and with whose knowledge such practices have been committed, is disqualified for ever from sitting for the place at which his offence was committed; and for seven years from sitting for any other.

Corrupt practices at a Parliamentary election.

If the corrupt practice was the unauthorized act of an agent, the employer is disqualified for seven years from sitting for the place at which the offence was committed; and a similar penalty follows on proof of illegal practices committed by a candidate, or with his knowledge on his behalf. Illegal practices by an agent disqualify the candidate for that constituency during the Parliament for which the election was held.

There are certain extinct forms of disqualification which still possess an interest for us; and perhaps the most important of these is the requirement to take an oath or oaths as a condition precedent to the right to sit and vote. The history of the subject may be stated as follows.

Extinct disqualifications. (a) The Parliamentary oaths.

The oath of supremacy was required to be taken before the Lord High Steward, by knights and burgesses, in the fifth year of Elizabeth<sup>2</sup>. One who entered the parliament-house without having taken the oath was to suffer such pains and penalties as if he had presumed to sit in the House 'without election, return, or authority.'

Oath of Supremacy.

The oath of allegiance was required to be taken by the same persons, and in the same manner, before they 'shall be permitted to enter the said house,' by 7 Jac. I, c. 6, s. 8. By 30 Car. II, st. 2 these oaths were required to be taken by both Houses, and no longer before the Lord Steward but by the Lords and Commons at the tables of their respective Houses<sup>3</sup>.

Of allegiance.

To these was added a declaration against transubstantia-

Declaration

<sup>1</sup> The Corrupt and Illegal Practices Act, 1883. See ss. 4, 5, 6, 11.

<sup>2</sup> 5 Eliz. c. 1.

<sup>3</sup> 30 Car. II, st. 2, c. 1.



against  
transub-  
stantia-  
tion.

tion, maintained as a condition precedent to the right to sit and vote until the Roman Catholic Relief Act of 1829.

The penalties for 'doing anything contrary' to these Acts were very heavy. The offender was liable to a penalty of £500 for each offence, was to be deemed a popish recusant, and was permanently disabled from holding any office civil or military, from sitting in either House of Parliament, prosecuting a suit in any court, or taking a legacy.

Oath of ab-  
juration.

The forms of the oaths were altered and shortened, but the declaration and the penalties were retained after the Revolution, by 1 Will. & Mary, c. 1, and in 13 Will. III, c. 6, an additional oath was required, the oath of abjuration.

The requirement of these oaths was confirmed, with the penalties, by 1 Geo. I, st. 2, c. 13, and thus the law remained, with some exemptions in favour of Quakers, until 1829.

Purport of  
the oaths.

The oath of allegiance was a declaration of fidelity to the reigning sovereign: the oath of supremacy was a repudiation of the spiritual or ecclesiastical authority of any foreign prince, person, or prelate, and of the doctrine that princes deposed or excommunicated by the Pope might be murdered by their subjects: the oath of abjuration was a repudiation of the right and title of the descendants of James II to the throne. To these must be added the declaration against transubstantiation.

This declaration, and the oath of supremacy, stood in the way of the Roman Catholics, while the oath of abjuration which concluded with the words '*on the true faith of a Christian*' could not be taken by a Jew.

The tremendous penalties imposed by the Act of Charles II were not directly taken away until the 29 Vict. c. 19 (1866), which left only the liability to pay £500 for every occasion on which a member sat and voted without taking the oath. In the reign of William III a refusal to take the oaths seems to have led to no worse consequences than a declaration by the House of Commons that the seat was vacant<sup>1</sup>.

Roman  
Catholics.

The Roman Catholic Relief Act, 1829, provided a single form of oath, acceptable to Roman Catholics and available

<sup>1</sup> Cases of Sir Henry Mounson and Lord Fanshaw. 10 Commons' Journals, 131; 5 Parl. Hist. 254.

to them only: it further abolished, in all cases, the necessity for the declaration against transubstantiation.

The Jews were still excluded by the concluding words of *Jews*. the oath of abjuration. These were held to be an integral part of the oath<sup>1</sup>, and thus, though the seat was not vacated, a Jew could not vote except under a ruinous penalty.

But in 1858 an Act was passed enabling either House to dispense with the use of the words 'on the true faith of a Christian' by resolution in individual cases: and in 1860 another Act gave power to either House to make a standing order to the same effect. Meantime in 1858 a single form of oath had been prescribed instead of the three oaths of allegiance, supremacy, and abjuration, and finally in 1866 the words which caused the difficulty were omitted from the statutory form required.

Henceforth difficulty arose only in the case of persons who objected on religious grounds to any form of oath, or of persons who having no religious belief objected to an oath as having no meaning for them.

The first was the case of Quakers, Moravians, and others *Quakers*, to whom it was objectionable to take an oath. These were <sup>&c.</sup> exempted expressly by various statutes, and were permitted to make affirmation in terms prescribed.

The second case gave rise to the mass of litigation to *Atheists*. which the late Mr. Bradlaugh was a party.

Mr. Bradlaugh, at the meeting of Parliament in 1880, demanded to be allowed to affirm instead of taking the oath, alleging that he, having no religious belief, was 'a <sup>The case of</sup> person for the time being permitted by law to make *Mr. Brad-* a solemn affirmation or declaration instead of taking *laugh.* an oath<sup>2</sup>.'

The House allowed him to make affirmation, and he was sued by an informer for the penalties due from him as having sat and voted without taking the oath.

The Court of Appeal, affirming the judgment of the Queen's Bench Division<sup>3</sup>, held that Mr. Bradlaugh was not

<sup>1</sup> *Müller v. Salomons*, 7 Exch. 475; 8 Exch. 778.

<sup>2</sup> 31 & 32 Vict. c. 72, s. 11.

<sup>3</sup> *Clarke v. Bradlaugh*, 7 Q. B. D. 38.

exempt from the liability to take the oath. The fact that under the Evidence Acts of 1869 and 1870 he would have been enabled to make a promise and declaration to tell the truth did not bring him into the class of persons indicated in the Parliamentary Oaths Act of 1866, and the Promissory Oaths Act of 1868. These were not persons on whom an oath would have no binding force, but persons who had a conscientious objection to taking an oath.

When the case of *Clarke v. Bradlaugh* reached the House of Lords<sup>1</sup> it was there held that the statutory penalty was not recoverable by a common informer; but Mr. Bradlaugh was held not to be entitled to make affirmation in lieu of the oath.

He then endeavoured to take the oath, but the House resolved that he should not be allowed to do so, and the Queen's Bench Division refused to make a declaration to the effect that he was entitled to do so<sup>2</sup>.

On the 11th of February, 1884, Mr. Bradlaugh entered the House; came to the table without being called upon by the Speaker; read from a paper in his hand the words of the oath, and having kissed a book which he brought with him, signed the paper and left it on the table. He subsequently voted in a division, and an action was brought against him, this time at the suit of the Crown, for the penalty which he had incurred by so voting.

The Court of Appeal, when the matter came before it<sup>3</sup>, held not only that the manner in which Mr. Bradlaugh had taken the oath was insufficient to meet the requirements of the Parliamentary Oaths Act, but that his want of religious belief, if proved to the satisfaction of a jury, made it impossible for him to satisfy the requirements of the Act even if he had taken the oath in due form.

On the 13th of January, 1886, Mr. Bradlaugh took the oath among other members elected to the new Parliament. The Speaker refused to intervene, holding that the resolution of the former House of Commons had lapsed with the

<sup>1</sup> *Clarke v. Bradlaugh*, 8 App. Ca. 354.

<sup>2</sup> *Bradlaugh v. Gossett*, 12 Q. B. D. 271.

<sup>3</sup> *Attorney-General v. Bradlaugh*, 14 Q. B. D. 667.

dissolution in 1885; that the Speaker had no authority to prevent a member from taking the oath; and that he should not permit (as a former Speaker had permitted) a motion to be made restraining a member from taking the oath. 'The honourable member,' he said, 'takes the oath under whatever risks may attach to him in a court of law.'

Mr. Bradlaugh therefore sat and voted subject always to the risk that the law officers of the Crown might proceed against him for penalties incurred and prove to the satisfaction of a jury that having no religious belief he had not taken the oath within the meaning of the Parliamentary Oaths Act.

The last stage in the history of this test of the political or religious creed of persons elected to serve in the House was reached in 1888, when the Oaths Act, 51 & 52 Vict. c. 46, was passed. By this Act it is provided that in all places and for all purposes where an oath is or shall be required by law an affirmation may be made if the person who should be sworn objects to take an oath either on the ground that he has no religious belief or that the taking of an oath is contrary to his religious belief. Affirmation in lieu of oath.

The affirmation is made in the following form: 'I, A. B., do solemnly, sincerely and truly declare and affirm,'—the words of the oath required by law are then proceeded with.

It should be noticed that all the express disabilities created by the form of oath have been imposed for political purposes, and so far as they were directed, as they mainly were directed, at Roman Catholics, their object was to exclude from Parliament persons who were presumed to be disloyal to the reigning sovereign, because they desired to see a Roman Catholic on the throne, or because they recognized, behind the throne, the supreme authority of the Pope. Object of disabilities political not religious.

The words which excluded Jews were not intentionally directed at them; nor would it seem that the question of the quality of religious belief apart from its political significance was ever raised before the case of Mr. Bradlaugh.

Nonconformists were never disqualified as such, except

in so far as their religious convictions prevented them from taking any form of oath. The Acts exempting Quakers and others who were in this way of thinking were designed 'to put Quakers on a footing with all other dissenters in England<sup>1</sup>.'

(b) Residence.

Residence is another of the extinct grounds of disqualification: for residence in their constituencies was required of the knights and burgesses who represented shires and towns by 1 Henry V, c. 1. This requirement had fallen out of use as early as the reign of Queen Elizabeth<sup>2</sup>, but the Act of Henry V was not repealed till 1774.

(c) Property.

A property qualification was created by 9 Anne, c. 5, consisting of an estate in land which, in the case of a knight of the shire, must be worth £600 a year, in the case of a burgess £300 a year; and this qualification had to be affirmed upon oath, and later by declaration made by the candidate upon the request of two electors, or of a rival candidate, at any time before the day fixed in the writ of summons for the meeting of Parliament.

This Act was modified by some subsequent statutes, but all the provisions relating to the qualification were repealed in 1858<sup>3</sup>.

(d) Profession of the law.

An Act of 1372 provides that 'no man of the law following business in the King's Court, nor any sheriff for the time that he is a sheriff, be returned nor accepted knight of the shire.' This statute was not repealed until 1871<sup>4</sup>, though its provisions had long been forgotten.

Resignation of a seat impossible.

But apart from the disqualifications which I have described as voiding an election, a member once elected can only cease to represent his constituency by reason of his death, or of the dissolution of Parliament. A seat cannot be resigned, nor can a man who has once taken his seat for one constituency throw it up and contest another. Either a disqualification must be incurred, or the House must declare the seat vacant; and, as we have seen, the House

<sup>1</sup> Hansard, 3rd Series, vol. xv, p. 639.

<sup>2</sup> 1 Parl. Hist. 749.

<sup>3</sup> 21 & 22 Vict. c. 26.

<sup>4</sup> 34 & 35 Vict. c. 116.

has not shown itself very willing to declare a seat vacant on the ground of physical incapacity, or personal unwillingness to serve.

The disability attaching to office is thus of great practical convenience. Certain old offices of nominal value in the gift of the Treasury are now granted, as of course<sup>1</sup>, to members who wish to resign their seats in order to retire from Parliament or to contest another constituency. Those which survive are the stewardship of the Chiltern Hundreds and of the manor of Northstead. The office is held during pleasure, and merely operates to vacate the seat.

The use of  
official dis-  
ability.

It is curious to note that a good many years elapsed after the passing of the Act of Anne before it was discovered that the acceptance of one of these small offices was a means of vacating a seat which a member desired to resign. The earliest use of a Stewardship of a royal manor for this purpose was in 1740. In that year Sir Watkin Wynn accepted the Stewardship of the king's lordship and manor of Bromhild and Gale in the county of Denbigh in order to vacate his seat for the county. In 1742 the Stewardship of the manor of Otford in Kent was used for the same purpose. In 1751 the Chiltern Hundreds first appears, in 1752 the manor of Berkhamstead. The Chiltern Hundreds and the manor of Northstead now alone remain to supply, in circuitous fashion, the formality which should attend the resignation of his seat by a member of the House of Commons.

<sup>1</sup> In 1775 Lord North refused the Chilterns to a political opponent, but the Chancellor of the Exchequer does not now make any inquiry into the objects for which the office may be sought, unless an election petition has been instituted or criminal proceedings taken against the member who applies. Since 1880 the words which expressed the confidence of the Crown in the fidelity of the person appointed have been omitted from the warrant. Report (Vacating of Seats), 1894 [278], p. 4. Sir William Harcourt's evidence, given before the Committee, describes the conditions under which these offices are now given. The history of the offices is set out in an Appendix to the Report.

*Form of warrant of appointment to the Stewardship of  
the Manor of Northstead<sup>1</sup>.*

To all to whom these Presents shall come, the Right Honourable Chancellor and Under-Treasurer of His Majesty's Exchequer, sendeth greeting. Know Ye, that I, the said have constituted and appointed, and by these presents do constitute and appoint to be Steward and Bailiff of the Manor of Northstead,

with the returns of all writs, warrants, and executions of the same, (in the room and place of whose constitution to the said offices I do hereby revoke and determine,) together with all wages, fees, allowances, and other privileges and pre-eminences whatsoever to the said offices of Steward and Bailiff belonging, or in any wise appertaining, with full power and authority to hold and keep Courts, and to do all and every other act and acts, thing and things, which to the said offices of Steward and Bailiff of the Manor aforesaid, or either of them, do belong or in any wise appertain, in as full and ample manner as any former Steward or Bailiff of the said Manor hath lawfully had, received, or enjoyed the same, to have and to hold the said offices of Steward and Bailiff of the said Manor, together with all wages, fees, allowances, and other privileges and pre-eminences whatsoever to the said

during His Majesty's pleasure; and I do hereby authorize and empower the said to demand and receive for His Majesty's use all Court Rolls and other writings relating to the said Manor from any person or persons having the same in their hands or custody. And all and every such person and persons having the same in their hands or custody are hereby required to deliver up the same to the said provided, nevertheless, that the said shall enter these presents in the office of the proper Auditor within forty days next after the date hereof, and shall yearly return the Court Rolls of the said Manor into the said office of the said Auditor, and account with the said Auditor for all such sum and sums of money as he, the said shall receive for and to His Majesty's use, within forty days next after the feast day of Saint Michael

<sup>1</sup> The warrant for the Chilterns is identical *mutatis mutandis*.

the Archangel, which shall happen in every year, or else these presents and everything herein contained to be void. In Witness whereof, I have hereunto set my hand and seal the  
day of in the  
year of the Reign of His Majesty King Edward the Seventh,  
and in the year of our Lord One Thousand Nine Hundred  
and

Downing-street, }

**NOTE I**

## OFFICIAL DISQUALIFICATIONS CREATED BY STATUTE<sup>1</sup>

i. *Persons concerned with the Administration of Justice.*

1. Judges of the High Court and Court of Appeal in England. (38 & 39 Vict. c. 77, s. 5.)
2. Registrars or other officers connected with any Court having jurisdiction in Bankruptcy in England. (46 & 47 Vict. c. 52, s. 116.)
3. County Court judges in England. (51 & 52 Vict. c. 43.)
4. Commissioners of Metropolitan Police. (19 & 20 Vict. c. 2, s. 9.)
5. Stipendiary magistrates for various towns are disqualified in the Acts which provide for their appointment.
6. A Recorder for his borough in England. (45 & 46 Vict. c. 50, s. 163.)
7. A Revising Barrister is disqualified for the county, cities, and borough comprised in his districts. The disqualification lasts during his term of office and for eighteen months after. (6 & 7 Vict. c. 18, s. 28.)
8. A Corrupt Practices Commissioner. (15 & 16 Vict. c. 57, s. 1.)
9. A barrister appointed to try municipal election petitions. (45 & 46 Vict. c. 50, s. 92.)
10. Judges of Court of Session, judiciary or baron of the Exchequer in Scotland. (7 Geo. II, c. 16, s. 4.)

<sup>1</sup> The following summary contains only such offices as disqualify absolutely either for certain constituencies or for all. I have not thought it necessary to set out a list of offices which entail a re-election.



11. Sheriff depute in Scotland. (21 Geo. II, c. 19, s. 11.)
12. Judges of the High Court and Court of Appeal in Ireland, including the Chancellor. (40 & 41 Vict. c. 57, s. 13.)
13. Masters in Chancery in Ireland. (1 & 2 Geo. IV,<sup>1</sup> c. 44, s. 1.)
14. Judges of Landed Estates Court, Ireland. (21 & 22 Vict. c. 72, s. 7.)
15. Assistant barristers in Ireland. (14 & 15 Vict. c. 57, s. 2.)
16. Justices and police officers in Dublin. (6 & 7 Will. IV, c. 29, s. 19.)
17. Magistrates and inspectors of constabulary, Ireland, appointed under the provisions of 6 & 7 Will. IV, c. 13, s. 18; 48 Geo. III, c. 140, s. 14.
18. A Recorder for his borough, in Ireland. (3 & 4 Vict. c. 108, s. 166.)
19. A member of, or person holding office under, the Irish Land Commission. (44 & 45 Vict. c. 49, s. 54.)
20. Registrar of deeds, Ireland. (2 & 3 Will. IV, c. 87, s. 36.)
21. Chairman or deputy chairman of London Quarter Sessions. (51 & 52 Vict. c. 41, s. 42.)

ii. *Persons representing the Crown or holding Offices at Court or under the chiefs of the great Departments of State.*

1. Colonial governors and deputy governors. (6 Anne, c. 7 [41], s. 24.)
2. The governors or deputy governors of any of the settlements, presidencies, territories, or plantations of the East India Company. (10 Geo. IV, c. 62, s. 1. This Act would appear to be continued 'mutatis mutandis' by the 'Act for the Better Government of India,' 21 & 22 Vict. c. 106, s. 64.)
3. Members of the Council of India. (21 & 22 Vict. c. 106, s. 12.)
4. A number of Court places were abolished in 1782, and it was provided that, if revived, they should be *new* offices

<sup>1</sup> This statute disqualifies the judges of the old Common Law and Chancery Courts in Ireland, and by subsequent Acts the judges in the Irish Courts of Admiralty, Probate, and Bankruptcy were also disqualified. These provisions, except in so far as vested interests are concerned, are merged in the general disqualifying clause of the Irish Judicature Act, 40 & 41 Vict. c. 57.

within the meaning of the Act of Anne. (22 Geo. III, c. 82, §§ 1, 2.)

5. Deputies or clerks in the departments of the Treasury, Exchequer, Admiralty, of the principal Secretaries of State, and a number of other Government offices. (15 Geo. II, c. 22 ; 41 Geo. III, c. 52, s. 4.)
- 6 Fifth Under-Secretary of State while there are four in the House. (21 & 22 Vict. c. 106, s. 4 ; 27 & 28 Vict. c. 34.)
7. Commissioners of Public Works, Ireland. (1 & 2 Will. IV, c. 33, s. 11.)

iii. *Persons concerned with the Collection of Revenue, or Audit of Public Accounts.*

1. Farmers, collectors, and managers of money duties, or other aid. (5 Will. & Mary, c. 7, s. 59.)
2. Farmers, managers, and collectors of customs. (12 & 13 Will. III, c. 10, §§ 87, 88.)
3. Commissioners and officers of excise in England and Ireland. (7 & 8 Geo. IV, c. 53, s. 8.)
4. Auditor of the Civil List. (56 Geo. III, c. 46, s. 8.)
5. Comptroller and Auditor-General, and assistant. (29 & 30 Vict. c. 39, s. 3.)
6. Collector-General of rates for Dublin, or any officer or servant in his employment for purposes of the Act. (12 & 13 Vict. c. 91, s. 24.)

iv. *Persons concerned with the Administration of Property for Public Objects.*

1. The Commissioners of Woods and Forests. (14 & 15 Vict. c. 42, s. 10.)
2. The Charity Commissioners (paid), their secretary and inspectors. (16 & 17 Vict. c. 137, s. 5.)
3. The Irish Church Temporalities Commissioners. (32 & 33 Vict. c. 42, s. 9.)
4. The Land Commissioners. (4 & 5 Vict. c. 35, s. 5.) [The Land Commissioners, who represented in respect of duties and of disabilities the Tithe, Enclosure and Copyhold Commissioners (45 & 46 Vict. c. 38, s. 48), are now made a part of the permanent staff of the Board of Agriculture to which their duties are transferred.]

5. Paid officers of a County Council, in England (51 & 52 Vict. c. 41, s. 83); and in Ireland (61 & 62 Vict. c. 37, s. 83).

*v. Miscellaneous disqualifying enactments.*

- 6 Anne, c. 7 [41], s. 24, includes commissioners or sub-commissioners of prizes, comptrollers of the accounts of the army, agents for regiments, commissioners for wine licences, and other incongruous offices.
- 41 Geo. III, c. 52, s. 4, disqualifies a number of holders of office in Ireland from sitting in the Parliament of the United Kingdom, and
- 57 Geo. III, c. 62, abolishes a number of Irish offices making provision for a new regulation of their duties and for the disqualification of persons holding any offices created in consequence of such regulation.

## NOTE II

### SUMMARY OF PRINCIPAL STATUTES CONCERNING THE PARLIAMENTARY OATH

- Oath of supremacy required to be taken before the Lord Steward by knights and burgesses. (5 Eliz. c. 1, s. 16.)
- Oath of allegiance by the same persons in the same manner. (7 Jac. I, c. 6, s. 8.)
- Oaths of allegiance and supremacy to be taken and subscribed and declaration against transubstantiation to be made by Lords and Commons in Parliament under penalty of £500 for every time of sitting and voting. (30 Car. II, st. 2, c. 1.)
- The forms of these oaths altered. (1 Will. & Mary, c. 8.)
- Oath of abjuration required of Lords and Commons as a condition precedent to sitting and voting, this oath containing the words 'on the true faith of a Christian.' (13 Will. III, c. 6.)
- The form of oath altered in some respects, but the concluding words of the abjuration oath retained and penalty imposed (£500). (1 Geo. I, st. 2, c. 13.)

Forms of affirmation provided for Quakers. (8 Geo. I, c. 6, amending or embodying earlier provisions in their favour. 22 Geo. II, c. 46.)

Oath suited to Roman Catholics provided by Roman Catholic Relief Act. (10 Geo. IV, c. 7, s. 2.)

Quakers and Moravians allowed to affirm. (3 & 4 Will. IV, c. 49.)

Ex-Quakers, ex-Moravians, and Separatists allowed to affirm. (1 & 2 Vict. c. 77.)

A single oath substituted for the oaths of allegiance, supremacy, and abjuration. (21 & 22 Vict. c. 48.)

Power given to either House by resolution in case of individual members of Jewish religion to omit the words 'upon the true faith of a Christian.' (21 & 22 Vict. c. 49.)

Power given to the House of Commons to make Standing Order to the same effect. (23 & 24 Vict. c. 63.)

Form of oath prescribed omitting these words, and also form of affirmation to be taken by every person 'for the time being by law permitted to make a solemn affirmation or declaration instead of taking an oath.' (29 Vict. c. 19, ss. 1, 4.)

Promissory Oaths Act shortens the previous form. (31 & 32 Vict. c. 72.)

Oaths Act 1888 enables any person who objects to being sworn, on the grounds either that he has no religious belief or that the taking of an oath is contrary to his religious belief, to make a solemn affirmation when and wheresoever the taking of an oath is required by law. (51 & 52 Vict. c. 46.)

## SECTION II.

### WHO MAY CHOOSE.

The right to vote for members to serve in the House of Commons is called the Franchise. The term Franchise is used indifferently for the right to vote and the qualification which confers the right. Strictly its meaning should be confined to the right. There is a third and distinct meaning in which the word signifies an incorporeal hereditament, <sup>The Franchise.</sup>

and is defined by Blackstone as 'a royal privilege or branch of the Crown's prerogative subsisting in the hands of a subject<sup>1</sup>.'

The possession of this franchise now depends, except in some few surviving instances, upon certain qualifications of property, occupation, or residence. Until very recently the qualifications which gave the right to choose a member for a county differed in many respects from those which gave the right to choose a member for a borough. They are now nearly though not wholly assimilated.

A mediaeval election.

The link between the borough and county representation is to be found in the form of writ, which until 1833 was addressed to the sheriff, commanding him to cause the election of two knights of his shire, together with two citizens of each city, and two burgesses of each borough, within the shire. The election took place 'in pleno comitatu,' and, from the year 1406 onwards, at the next meeting of the county court after the writ was received. So soon as the writ was received from the office of the Crown in Chancery, the sheriff issued his precept to the returning officers of the cities and boroughs, and announced the holding of a special county court for the purpose of the election. The towns made their election in accordance with the custom and procedure which had settled the franchise in each borough. The county court, when it met, was adjourned from day to day during such time as the poll might legally be kept open. At the close of the poll for the county election the result of that election was declared, and the knights of the shire were girt with swords in compliance with the terms of the writ. By this time the returns to the precepts had come in from the towns, the notification of their choice was made, and the formal election took place accordingly.

By 7 Hen. IV, c. 15 (1406), the sheriff was required to return the writ to Chancery, and not, as heretofore, to the Parliament, and he was further required to append to the writ indentures in which the names of the persons chosen were to be written 'under the seals of them that

<sup>1</sup> Stephen's Commentaries (ed. 15), i. 448.

did choose them.' These indentures ensured that the persons returned were the persons elected by the county, and were not the arbitrary choice of the sheriff. A like precaution was taken in 1444<sup>1</sup> in respect of the towns.

So, after the declaration of the poll for the county election, a certain number of the electors present set their hands and seals to the indentures containing the names of those elected, and these, fastened to the writ, were returned, together with the precepts and indentures relating to the towns, to the Clerk of the Crown in Chancery.

Such was the form of a Parliamentary election down to 1853, when it was enacted<sup>2</sup> that the writs for cities and boroughs should be sent direct to the returning officers of those places, and should no longer pass through the hands of the sheriff.

This outline of the procedure of an election may serve to show that county and borough members were held together not merely by the interests which they had in common against the Crown and the magnates, nor by the representative character which they alike possessed, but also by the fact that they were all returned to Parliament through the same local machinery, that of the county court.

And from this procedure one may also understand how it came about that, before the Reform Act of 1832, the county franchise was simple and uniform, the borough franchise complicated and various, that it was to the county elections that one looked for a genuine expression of political opinion, when the electoral rights of a large number of the boroughs had so far become pieces of private property that a man might, by purchase or inheritance, acquire the right of returning one or more members to Parliament. But I will not deal further at present with the mode of conducting an election. It is necessary first to ascertain who may choose members to serve in Parliament, or in other words what constitutes the qualification

<sup>1</sup> 23 Hen. VI, c. 15.

<sup>2</sup> 16 & 17 Vict. c. 68, s. 1.

of an elector. How the electors may choose, in what constituencies and by what process, will form matter for a separate section.

The  
modern  
Franchise.

The Franchise now rests mainly, though not entirely, upon the Act of 1884; but since this Act comprehends various older Statutes and requires to be read in connection with them, and leaves in existence various ancient and modern franchises to which it makes no reference, we must inquire what electoral rights have been, as well as what they are.

The three grounds on which a man may nowadays rest his right to vote are Property, Occupation, Residence; that is to say, under various conditions, to be dealt with hereafter, he has a vote in respect of a tenement which he owns, or which he uses, or which is his dwelling. But it is certain that when our representative system began, the right to vote was conditional upon residence: for it was coincident in the counties with the right to attend the county court<sup>1</sup>, while amid the obscurity which rests on the early history of the borough franchise this much is clear, that whether the right to vote depended on the holding of land or on contribution to local burdens, residence was in either case required, or perhaps it might be more true to say that non-residence was not contemplated. By 1 Henry V, c. 1, residence was required alike of members and of electors; the fact that this statute had fallen out of use two centuries before it was repealed in 1774 is only an illustration of the tangled growth of our representative system before 1832. But what I have to say on this part of the subject may be conveniently divided as follows:—

Divisions  
of subject.

- |  |                |
|--|----------------|
| 1. The English county franchise,       | } before 1884. |
| 2. The English borough franchise,      |                |
| 3. The Scotch franchise,               |                |
| 4. The Irish franchise,                |                |
| 5. The effect of 48 Vict. c. 3.        |                |
| 6. Disqualifications and incapacities. |                |

<sup>1</sup> See Stubbs, Const. Hist. ii. 205, as to constitution of county court.

§ 1. *English County Franchise before 1884.*

I will take first the modifications of the county franchise before 1884. The right to vote for the representative knights of the shire was vested originally in those who were entitled to attend the county court; and by 7 Hen. IV, c. 15, the election was to be made at the next meeting of the county court after the receipt of the writ, and the return of the writ was to be accompanied by indentures under the seals of the electors to ensure the identity of the man chosen with the man returned. But when the county court had lost much of the business which gave it importance, the attendance was apt not to be representative. The next meeting of the county court might occur too soon after the receipt of the writ by the sheriff for a full meeting to be summoned, and so it might happen that the election would fall into the hands of the sheriff, or of a few interested persons or of a disorderly crowd.

The suitor  
to the  
County  
Court.

In the year 1430 was passed the Act<sup>1</sup> which determined the county franchise for 400 years, limiting its exercise to residents possessing a freehold worth forty shillings a year. The sheriff was empowered to examine voters upon oath as to their qualification, and an Act of 1432 required that the freehold should be situate and the voter resident in the county for which the vote was claimed. The last requirement fell into disuse, and was abolished by 14 George III, c. 58.

The forty  
shilling  
free-  
holder.

The Act of Henry VI was not, as it has been sometimes described, an aristocratic revolution, though the qualification was high. It was designed to secure orderly elections, and impose such a qualification as should exclude the casual crowd which attended the county court. At any rate it does not seem to have altered the character of the representation in the mediaeval Parliaments<sup>2</sup>; the forty-shilling freeholder chose the same class of representative as the suitors at the county court had chosen. In course of time the qualification was extended to other freehold interests than tenancies for life, in tail or in fee

<sup>1</sup> 8 Hen. VI, c. 7.

<sup>2</sup> Stubbs, *Const. Hist.* iii. 111.



namely to leases for lives, annuities, rent charges, and freehold offices if of the necessary value, and subject to certain conditions as to length of tenure previous to the election<sup>1</sup>.

The qualification by Property.

But the forty-shilling freehold is now only one of several property qualifications restricted to counties and to towns which are counties corporate; and the reforms of 1832 and 1867 introduced other qualifications confined to counties and depending not upon property but upon occupation.

Act of 1832.

First as to Property. The Reform Act of 1832 confined the effect of the forty-shilling freehold qualification to cases in which the property was in occupation of the voter; or where it was an estate of inheritance; or, if a life estate and not in occupation—then, where it had been acquired by marriage, marriage-settlement, devise or promotion to a benefice or office.

Besides the retention of the ancient freehold qualification in this limited form, the Reform Act introduced four other property and non-residential qualifications into counties. These were (a) freehold for life not occupied, nor acquired as above described, of the clear yearly value of £10; (b) copyhold, or land held on any other tenure but freehold, of the same value; (c) leasehold of the same value and for a term originally created for not less than sixty years; and (d) leasehold of £50 clear yearly value, and for a term originally created for not less than twenty years.

Act of 1867.

The Representation of the People Act of 1867 reduced the value required for the first three of these franchises to £5; the Act of 1884 leaves them alone.

By Occupation.

Next as to Occupation. The Reform Act created an Occupation franchise in counties for the occupier 'as tenant of any lands or tenements for which he should be liable to the clear yearly rent of £50<sup>2</sup>.' Besides this, the sublessee or assignee of an underlease of interests (c) and (d) above described could vote in respect of them if in occupation.

Act of 1832.

<sup>1</sup> Blackstone, i. 173; Porritt, *History of the Unreformed House of Commons*, i. 22.

<sup>2</sup> The clause creating this qualification (2 & 3 Will. IV, c. 45, s. 20) known as the 'Chandos clause' is expressly repealed by the Act of 1884.

Alongside of this was created a new occupation franchise in counties by the Act of 1867. This depended not upon rental but upon rating, and the qualifying land or tenement had to be of the rateable value of £12. The holding must have been rated, and the occupier must have paid his rates<sup>1</sup>. Act of 1867.

Such was the county franchise before the Act of 1884.

### § 2. *English Borough Franchise before 1884.*

The condition of the borough franchise before 1832 exhibits a curious medley of political rights<sup>2</sup>: for the boroughs were left free from all legislative interference as to the mode in which they should elect their representatives: all that was required was that the persons returned should be the persons really chosen, and that they should be fully empowered to bind their constituents. To this end an Act of 1444<sup>3</sup> required that the return made by the mayor, or bailiff of the borough, to the sheriff's precept, should be accompanied with indentures similar to those which accompanied the return of the county election<sup>4</sup>, made under the seals of those that chose the member. As the boroughs were thus left to choose their own mode of election, the result was, as one would naturally expect, a great variety of custom, amid which it is not easy to frame any certain or coherent scheme of electoral rights. Nevertheless, though modified in themselves, and combined with one another in various ways, four sorts of franchise appear distinct in character if not in origin. Qualifications in boroughs before 1832.

The first of these was based on tenure. This was probably the most ancient, and in most cases represented the right of the members of the township, as evidenced by the holding of land, to take part in the management of the affairs of the community. Tenure.

<sup>1</sup> This qualification is extinguished by necessary implication from 48 Vict. c. 3, s. 5.

<sup>2</sup> For a fuller account of the borough franchise before 1832 see Porritt, *History of the Unreformed House of Commons*, vol. i, ch. i.

<sup>3</sup> 23 Hen. VI, c. 15.

<sup>4</sup> 7 Hen. IV, c. 15.

**Residence.** The second was dependent on residence, in almost all cases coupled with payment of 'scot and lot,' that is, contribution to charges for local or national purposes. This would seem to be an extension of the land-holding qualification to those who bore their share of the burdens of the community.

**Incorporation.** The third was incorporation, and seems to connect political with trading privileges by the assignment of the franchise to the freemen of the chartered town either exclusively or jointly with voters otherwise qualified. The freeman, by his admission to membership of the Corporation, acquired rights but did not of necessity incur liabilities. He need not hold land nor incur the obligations laid upon land, nor contribute in his character of freeman to the local charges.

**Corporate office.** The fourth qualification was corporate office, a narrower form of the right arising from incorporation. This was the latest of the qualifications, and vested in the officers of the chartered town the right to return representatives to Parliament. It will be found that in all the cases in which the franchise was thus limited, the town in question was either chartered or summoned in the reigns of the Tudors, or else that the limitation was fixed by a resolution of the House of Commons, subsequent to the Restoration, based upon an interpretation of the charter. In the case of such a resolution, the inhabitants sometimes urgently contested the right with the corporation, as in the case of Bath, Malmesbury, and Salisbury<sup>1</sup>. Sometimes, as in the case of Wilton and Winchester, they acquiesced without a struggle.

**Varieties in qualification by tenure.** But each of these kinds of qualification admitted of many varieties. The qualification by tenure in some towns which were also counties, as Nottingham and Bristol, was the forty-shilling freehold, in others it was land held on burgage tenure; in some cases it was limited to particular tenements, as at Richmond, where they only might vote who held burgage tenements carrying with them the right

<sup>1</sup> I have taken these facts, and others which follow, as to particular boroughs from Oldfield's History of Representative Government, checking his statements by reference to the Commons' Journals.

to have pasture on a certain common field. At Cricklade the qualification was not only freehold, but copyhold of lands held within the borough; or leasehold of a term of not less than three years. At Clitheroe, the franchise was in the *owners* of burgage tenements though non-resident; but if they did not choose to exercise their rights, then the *occupiers* of the tenements became entitled to vote.

The qualification by residence extended, at Preston, to all the inhabitants; at Taunton to those who had a parochial settlement and were self-supporting, the 'potwallers' who boiled their own pot: in a great majority of cases it was a necessary feature of the qualification that the voter should be a householder and contribute to local rates and taxes, 'scot and lot'; but it would seem that in some cases the contribution to local burdens, coupled with residence, might give a vote to one who was not a householder.

The qualification of the freeman might be acquired in various ways,—by birth, by marriage with the daughter or widow of a freeman, by apprenticeship or servitude, by purchase, or by gift. The mode of acquisition was different in different towns, and where it lay in the power of the corporation to give the freedom to whom it pleased, the creation of freemen for election purposes was unlimited<sup>1</sup>. In some boroughs the freemen were required to be resident in order to obtain the franchise; in others they were scattered over the country. In the first case they were usually corruptible on the spot, in the second the cost of carriage was added to the cost of the vote.

Where the right to return members lay with the officers of the corporation, the constituency would depend on the composition of the governing body created by the charter.

From what has been said it will be seen that neither the condition of the borough franchise in the middle ages, nor the mode of its exercise, is very easy to determine. When the House of Commons began to determine disputed returns, we get such knowledge of the franchise in the seventeenth century as shows us clearly that it could never have been uniform; and such accounts as we have of

<sup>1</sup> Municipal Corporations Commissioners' Report, i. 35.

mediaeval elections<sup>1</sup> seem to suggest that the whole body of electors not unfrequently entrusted the choice of their representative to a committee, sometimes consisting of the municipal officers, sometimes selected from them or from the whole electorate, or from both.

As we approach the time when political interest grows stronger, and a seat in Parliament becomes a thing to be desired, we find three influences acting upon the condition of the franchise, all tending indirectly to narrow, to confuse, and to corrupt the right of voting in the towns.

Effect of  
charters of  
incorpora-  
tion :

First, we may put the increase of charters of incorporation granted to towns from the time of Henry VI onward. From this period the object of such charters was not so much to confer new privileges as to define the rights of the townsmen *inter se*, and to organize the corporate government. The process by which the merchant guild of a town became identified with the older town community is part of municipal history with which we are not here concerned, except in so far as the Parliamentary franchise came thereby to be vested, either exclusively or jointly with other voters, in the freemen of a corporate town.

But it is to this influence that we must attribute the acquisition by the official members of the corporation of the exclusive right to elect the representatives of the borough. In some cases this was directly conferred by charter, in others it was assumed by the governing body of the corporation, but here too the claim was based upon the charter and was admitted by committees of the House of Commons.

of the  
Tudor  
boroughs :

Next, we must put the grant, either by summons or by charter followed by summons, of the right of representation to towns which were never meant to represent anything but the influence of the Crown in Parliament. Thus, at the commencement of the Tudor additions to the representation, six Cornish boroughs returned twelve members; at their conclusion twenty-one Cornish boroughs returned forty-two members. In the majority of these towns the franchise was vested in the corporation, and they would indirectly

<sup>1</sup> Stubbs, Const. Hist. iii. 415-419.

affect the condition of the franchise elsewhere, for they would offer analogies and precedents, in other cases where rights of election were in issue, to election committees of the House of Commons. Such precedents would operate with the more force, because some of those who judged of the returns themselves owed their seats to this corrupt and restricted franchise.

And this brings me to the third influence exercised upon elections—the decision of disputed returns in election committees of the House of Commons. The history of this privilege of the House and the mode of its exercise are described elsewhere. Here we need only note the effect upon electoral rights, in the different boroughs where they were called in question, of the decisions of a tribunal unsuited for judicial work, often animated by partisan or personal feelings, and inclined from self-interest to narrow the franchise. When once a committee had declared an election to be invalid on the ground that the votes of a particular class of voters had been accepted or rejected, the right of that class was settled and the custom of the borough fixed. In 1729 an Act<sup>1</sup> was passed providing that ‘the last determination in the House of Commons’ should settle the legality of votes.

of deci-  
sions of  
House of  
Commons.  
Sect. iv.  
§ 3 (a).

It is not necessary, nor would it be desirable here, to discuss the merits and demerits of the borough franchise such as it had become by the year 1832. That franchise had developed absolutely free from legislative interference. Except in the case of boroughs convicted of notorious corruption, whose right to return representatives had, in consequence, been extended by Act of Parliament to the freeholders of the adjacent hundreds, custom and common law, interpreted by the resolutions of Parliamentary committees, alone determined the right to vote.

That the representation was inadequate and corrupt there can be no doubt. When the qualification depended on tenure it would often happen that the qualifying tenements were very few in proportion to the population, or sometimes that the population had entirely disappeared,

<sup>1</sup> 2 Geo. II, c. 24, s. 4.

leaving the constituency to consist in the owner or owners of a few plots of land. Where the qualification was residence, or freedom, bribery was largely practised, and, where the freedom was in the gift of the corporation, freemen were created in great numbers to turn an election. It is hardly necessary to note the illusory character of a franchise vested in the officials of a corporation; one can only wonder that the mere absurdity of the representation of a town like Bath by members chosen by a body of twenty-four officials of the corporation should not have condemned a system which in the unchecked growth of centuries had assumed a form so grotesque.

Reform  
Act, 1832.

The Reform Act of 1832 made a clean sweep of these anomalies. It preserved all individual electoral rights vested at the date of the passing of the Act: but beyond this it abolished the old franchises with two exceptions.

Retention  
of old,

It retained the forty-shilling freehold qualification in towns which were counties, subject to the limitations imposed on the like qualification in counties. It further retained the qualification enjoyed by a freeman of a chartered town in those towns wherein the qualification had heretofore prevailed; but the modes of acquiring freedom were limited, for the purpose of the franchise, to birth and servitude, and residence in or within seven miles of the city or borough was made a part of the qualification.

creation of  
new quali-  
fications.

Apart from these survivals of the old qualifications, the right to vote in cities and boroughs was made to rest uniformly upon *Occupation*. By s. 27 a qualification is given to the occupier, as owner or tenant, of any house, warehouse, counting-house, shop, or other building which either separately or jointly with other land occupied by him in the same city or borough is of the clear yearly value of £10. The occupier must have been rated in respect of his tenement, must have paid his rates, and must have resided, during six months before his registration as a voter, in or within seven miles of the place for which he claims a vote. By the Registration Act<sup>1</sup> of 1878

2 & 3  
Will. IV,  
c. 45, s. 27.

<sup>1</sup> 41 & 42 Vict. c. 26, s. 5.

the qualification extends to any *part* of a house separately occupied under the above conditions.

Such was the borough franchise from 1832 to 1867. The Representation of the People Act introduced the Household and the Lodger franchise.

To be entitled to the Household franchise a man must Residence. occupy as owner or tenant, for twelve calendar months before the 15th<sup>1</sup> of July in the year in which he claims to The householder. be registered, a dwelling-house in the borough. He must have been rated to the poor-rate, and have paid by the 20th of July so much rate as had accrued up to the preceding 5th of January.

It is important to note two points; for the Act of 1884 while extending the area has not altered the character of this franchise.

(a) The word 'dwelling-house' was defined in the Act of 1867 as any part of a house occupied as a separate dwelling Definition of dwelling-house. and *separately rated to the relief of the poor*. The definition has been altered by the Registration Act of 1878<sup>2</sup> in such a way as not to include separate rating as part of the qualification. An obvious difficulty arises, and one which courts of law have acknowledged to be almost insuperable, in distinguishing the householder from the lodger. The householder's tenement must be rateable though it need not be separately rated, and rates must be paid in respect of it, but, as will be seen, such rates need not be paid by the householder. If he occupies a part of a house, not separately rated, he must be deemed a householder or a lodger according to his relations with the owner of the entire building<sup>3</sup>.

(b) The Act of 1867 required not merely that the dwelling-house should be rated but that the occupier should be rated and should pay the rates. In fact the Act intended the household franchise to depend upon the personal payment of rates by the voter, thereby preventing it from being acquired where the practice of compounding prevailed. Requirements as to payment of rates.

<sup>1</sup> The 31st was the date fixed for Householder and Lodger by the Act of 1867. The 15th is fixed by 41 & 42 Vict. c. 26, s. 7.

<sup>2</sup> 41 & 42 Vict. c. 26, s. 5.

<sup>3</sup> *Bradley v. Baylis*, 8 Q. B. D. 219.



'Compounding' meant that the owner was rated in lieu of the occupier and made his own terms with the overseer and the occupying tenant.

But the Poor-rate Assessment and Collection Act, 1869<sup>1</sup>, provides that (1) an owner may agree, in certain cases, with the overseers, or (2) may be compelled by the vestry to be rated instead of the occupier, or (3) may make his own terms with the tenant as to paying the rates, and in no case is the tenant to lose his vote by means of such a transaction between his landlord and the overseers or between his landlord and himself. The overseer is bound to enter on the rate-book every occupier of rateable premises, and the occupier is not to lose his vote by reason of an omission to do this on the part of the overseer. These provisions, 'ex abundanti cautela,' are made of general application by the Registration Act of 1878<sup>2</sup>. Such was and is the Household, or as it is more commonly called the 'Inhabitant occupier' franchise.

The  
lodger.

The Lodger franchise was given by the Act of 1867 to one who has resided in the same lodgings as a sole tenant for twelve months next preceding the 31st of July<sup>3</sup> in the year in which he claims to be registered, such lodgings being of the clear yearly value unfurnished of £10. By the Act of 1878<sup>4</sup> the lodger may during his period of residence have occupied different lodgings in the same house without invalidating his vote, and may be a joint occupier with another if the total rent is equivalent to £10 apiece.

### § 3. *The Scotch Franchise before 1884.*

Scotch  
franchise  
in coun-  
ties :

Until the year 1832 the Scotch representative system was in a condition even more strange and anomalous than the English. The county qualification was twofold, (1) a 'forty-shilling land of old extent' held of the Crown; or (2), if not of old extent, then rated in valuation books at £200 of valued rent.

<sup>1</sup> 32 & 33 Vict. c. 41, ss. 3, 4, 7, 8.

<sup>2</sup> 41 & 42 Vict. c. 26, s. 14.

<sup>3</sup> The date was altered to the 15th by the Act of 1878.

<sup>4</sup> 41 & 42 Vict. c. 26, s. 6.

The qualification was thus a purely freehold qualification under conditions more exacting than were required of the English freeholder.

The boroughs elected their representatives on a still less in popular franchise. Those entitled to be represented were boroughs. the sixty-six royal burghs, of which Edinburgh alone had a member to itself. The others were divided into fourteen groups, of which each group was entitled to a member. On the occasion of an election the sheriff gave notice to the town council of each burgh; they each elected a delegate; the delegates met in their respective groups, and so elected the representatives of the burghs<sup>1</sup>.

The legislation of 1832 altered the distribution of seats <sup>2 & 3 Will. IV, c. 65</sup> and swept away the old franchises except in so far as individual vested interests were affected. It created property and occupation franchises in counties, and an occupation franchise in boroughs, following the model of the English franchises of that nature both in character and amount, except in so far as Scotch property law compelled differences of detail<sup>2</sup>.

In like manner did the Scotch Reform Act of 1868 <sup>31 & 32 Vict. c. 48.</sup> reduce the property and occupation franchise in counties and introduce the household and lodger franchise in boroughs, leaving existing borough franchises intact.

#### § 4. *The Irish Franchise before 1884.*

The Irish borough and county franchise before the Reform Bill exhibited much the same features as the English representative system. The forty-shilling freehold had qualified for the franchise in counties from the earliest days of Irish Parliaments, but from the beginning of the reign of George I the exercise of the franchise had been confined to Protestants. In 1793 the Irish Parliament

<sup>1</sup> A full account of the qualifications for the franchise and the conditions of representation in the unreformed Parliament is to be found in Porritt, *The Unreformed House of Commons*, vol. ii, part v.

<sup>2</sup> The clause in the Scotch Act of 1832 which creates a £50 occupation qualification on the analogy of the Chandos clause in the English Act of 1832 is expressly repealed by the Act of 1884.

removed this, with other disabilities, and the forty-shilling freeholders became so important an element in the Parliamentary constitution that their action was largely instrumental in securing the admission of Roman Catholics to Parliament in 1829.

But in the year in which the Roman Catholic Relief Bill was passed a disfranchising bill also became law, by which no freeholder was entitled to vote for a county unless he had an estate of £10 a year <sup>1</sup>.

Reform of  
1832,

The legislation of 1832<sup>2</sup> swept away the old borough qualifications except, as in England, in certain cases of freemen, and of freeholders in towns which were counties, and introduced the occupation qualification and extended the qualification in counties to leaseholders and copyholders: this last a somewhat idle boon, since there is no copyhold in Ireland.

of 1850,

The franchise was further extended by an Act of 1850<sup>3</sup> to £12 occupiers and £5 freeholders in counties, and to £8

of 1868,

occupiers in towns. In 1868, the lodger qualification was introduced in boroughs, as in England and Scotland; nevertheless the occupier's qualification was only reduced from £8 to £4<sup>4</sup>.

### § 5. *The Representation of the People Act, 1884.*

48 *Victoria*, c. 3.

We are now in a position to consider the Act of 1884. It has been necessary to go through the details of some of the franchises created by previous Acts, because the Act of 1884 retains them, and they form a part of it. It must be borne in mind that the Act of 1884, though it has simplified the franchise, has not simplified the law relating to the franchise; the rules relating to electoral rights must still be sought in the clauses of various statutes, some of which are left in existence, and must be read into the Act, while others are repealed and their provisions embodied in it.

<sup>1</sup> 10 Geo. IV, c. 8. I must again refer the reader to Porritt, *The Unreformed House of Commons*, vol. ii, part vi, for an account of the Parliamentary franchise in Ireland before 1832.

<sup>2</sup> 2 & 3 Will. IV, c. 88.

<sup>3</sup> 13 & 14 Vict. c. 69.

<sup>4</sup> 31 & 32 Vict. c. 49.

But we can now set forth our electoral law for England, Scotland, and Ireland as uniform, with some few exceptions, in town and county, throughout the three kingdoms.

It will be simplest to group the existing franchises under the three great heads of qualification—Property, Occupation, Residence—and to point out in each case the statutory authority for the qualification. I think it well to keep these three kinds of qualification apart, for the difference between Occupation and Residence is a real difference: but it is common to describe the last two under the term Occupation, distinguishing three sorts of voters as comprised under this term, the *occupier*, the *inhabitant occupier*, and the *lodger*.

### Property.

Property qualifications are the great exception to the uniformity created by the Act. They are limited in all cases to counties, and, in England, to certain towns which are counties<sup>1</sup>. They are untouched by the Act of 1884, except in respect of the multiplication of votes by fictitious qualifications. They are therefore more various throughout the three kingdoms than are the qualifications by Occupation and Residence.

They are as follows.

In England:—

*Freehold*, of forty shillings clear yearly value in the occupation of the voter, or, if not in occupation, then if an estate of inheritance, or acquired by marriage settlement, devise, benefice or office<sup>2</sup>.

*Freehold*, of £5 clear yearly value, if an estate for life, not in occupation or acquired as above described<sup>3</sup>.

*Copyhold*, or any tenure other than freehold, of £5 clear yearly value<sup>4</sup>.

*Leasehold*; (1) of £5 clear yearly value, if originally

<sup>1</sup> There are now four, Bristol, Exeter, Norwich, and Nottingham, in which freeholders exercise the borough franchise. In other cities and towns which are counties corporate, 15 in number, this usage does not prevail.

<sup>2</sup> 8 Hen. VI, c. 7. 2 & 3 Will. IV, c. 45, s. 18.

<sup>3</sup> 30 & 31 Vict. c. 102, s. 5.

<sup>4</sup> 30 & 31 Vict. c. 102, s. 5.

created for a term of not less than sixty years; (2) of £50 clear yearly value, if originally created for a term of not less than twenty years<sup>1</sup>.

A sub-lessee or assignee of leasehold of this value is entitled to vote if in occupation<sup>2</sup>.

In Scotland:—

31 & 32  
Vict.  
c. 48, s. 5.

*Lands and heritages in proprietorship* of £5 yearly value as appearing in the valuation roll.

*Leasehold* of £10 clear yearly value if for life or originally created for a term of not less than fifty-seven years; of £50 clear yearly value if originally created for a term of not less than nineteen years.

In Ireland<sup>3</sup>:—

*Freehold* of £5 net annual value.

*Rentcharges* (subject to the provisions of 48 Vict. c. 3, s. 4) *and leases for life or lives* of £20 clear annual value.

*Leasehold* of £10 clear annual value if created originally for a term of not less than sixty years; of £20 clear annual value if originally created for a term of not less than fourteen years<sup>4</sup>.

### Occupation.

Qualifica-  
tion uni-  
form in  
value.

Throughout the United Kingdom<sup>5</sup> there is a uniform qualification given to the occupier for twelve months before registration—in England, Ireland, and in Scotch burghs, as owner or tenant, in Scotch counties as tenant, of any land or tenement within the county or borough of the value of £10.

These qualifications differ in three ways.

Difference  
in mode of  
assessing  
value,

(1) As to the mode of ascertaining the value of the qualifying tenement, it is—

In England, clear yearly value;

In Scotland, annual value appearing in valuation roll;

In Ireland, net annual value according to last poor-rate.

<sup>1</sup> 30 & 31 Vict. c. 102, s. 5.    2 & 3 Will. IV, c. 45, s. 20.

<sup>2</sup> *Chorlton v Stretford*, L. R. 7 C. P. 201.

<sup>3</sup> 13 & 14 Vict. c. 69, s. 2.    35 Geo. III (Irish Act), c. 29, ss. 25, 30.

<sup>4</sup> 3 & 4 Will. IV, c. 88, s. 1.

<sup>5</sup> 48 Vict. c. 3, s. 5.

(2) As to residence required of the occupier:—

in require-  
ments of  
residence;

In English and Scotch counties, and in Irish counties and boroughs, none is required.

In English boroughs residence during six months of the qualifying year in or within seven miles of the borough.

In Scotch burghs residence corresponding to that of the English occupier.

(3) As to rating and payment of rates and taxes:—

and of rate-  
paying.

In England the county and borough occupier must alike occupy land rated to the poor-rate, and by the 20th of July in the year of his claim to vote, all such rates as were due on the preceding 5th of January must have been paid.

The borough occupier must further have paid all assessed taxes due from him up to that date.

In Scotland the *county* occupier must have paid by the 20th of June in the year of his claim all poor-rates due from him up to the 15th of May: the *borough* occupier must have paid by the 20th of July all assessed taxes<sup>1</sup> due from him up to the 6th of April.

In Ireland the county and borough occupier must alike have been rated to the poor-rate, and must have paid by the 1st of July in the year of his claim all rates due up to the 1st of January.

The English occupation franchise depends, as to *value*, on 48 Vict. c. 3, s. 5: as to *conditions*, in counties, on 30 & 31 Vict. c. 102, s. 6; in boroughs, on 2 & 3 Will. IV, c. 45. Statutory  
authori-  
ties.

The Scotch depends, as to *value*, on 48 Vict. c. 3, s. 5: as to *conditions*, in counties, on 31 & 32 Vict. c. 48, s. 6; in burghs, on 2 & 3 Will. IV, c. 65, s. 11.

The Irish depends, as to *value*, on 48 Vict. c. 3, s. 5: as to *conditions*, on 13 & 14 Vict. c. 69, ss. 1, 5.

<sup>1</sup> The change of assessed taxes into establishment licences would seem to have greatly reduced the requirement of assessment. The house-tax is now the only tax to which the occupier can be assessed.

**Residence.***The Householder.*

The  
House-  
holder.

The Household qualification is now uniform throughout the United Kingdom, and is given to the *inhabitant* occupier (whether he occupies as owner, as tenant, or in virtue of any office, service, or employment) of a dwelling-house, or any part of a house occupied as a separate dwelling, which has been rated, and for which rates have been paid by certain dates in the year of claim, which dates differ in England, Scotland, and Ireland. It is not necessary that each portion of a house should be separately rated in order to constitute a separate dwelling: but the portion in respect of which the franchise is claimed must be separately rateable<sup>1</sup>.

Actual inhabitancy during every part of the year is not necessary, in point of fact a small period of actual residence will suffice, but where actual inhabitancy is discontinuous there must be 'constructive inhabitancy,' and this involves the 'intention of returning after a temporary absence, and a power of returning at any time without a breach of a legal obligation<sup>2</sup>.' For want of such constructive inhabitancy a soldier occupying quarters from which he is required to be absent from time to time on duty is not entitled to vote though his quarters would otherwise have qualified him. For the same reason an undergraduate occupying college rooms from which he is excluded in vacation is not entitled to vote in respect of his rooms. But if a man let his premises, furnished, for a term not exceeding four months his occupation is not so broken as to deprive him of his vote, though he reserve no power of returning at will to any part of the house during that period<sup>3</sup>.

The creation of the household franchise dates from the Representation of the People Act, 1867<sup>4</sup>, which applied it to English boroughs, and the Act of 1868 which applied

<sup>1</sup> *Bradley v. Baylis*, 8 Q. B. D. 216, 218.

<sup>2</sup> See *Atkinson v. Collard*, 16 Q. B. D. 254; *Tanner v. Carter*, 16 Q. B. D. 231.

<sup>3</sup> 41 & 42 Vict. c. 3.

<sup>4</sup> 30 & 31 Vict. c. 102, s. 3.

it to Scotch burghs<sup>1</sup>. Its extension to counties in Scotland and England, to counties and boroughs in Ireland, and its application to dwellings occupied in virtue of any office, service, or employment was the work of the Act of 1884<sup>2</sup>. But the qualification in this last case depends upon the house not being inhabited by the employer of the person claiming to vote.

The provisions as to rating are complicated. The Act of 1867 made the franchise depend on the personal payment of rates. The Poor-rate Assessment and Collection Act of 1869<sup>3</sup> altered the law in the mode described on a preceding page. Its provisions were extended by the Registration Act of 1878<sup>4</sup>; and were made applicable to Ireland by the Act of 1884<sup>5</sup>; it is made the duty of the overseers throughout the United Kingdom to ascertain with respect to every dwelling-house who is entitled to vote in respect of it.

### *The Lodger.*

The Lodger qualification is also uniform throughout the United Kingdom, and is given to every occupier, as lodger, of lodgings of the clear yearly value, if let unfurnished, of £10 for twelve months before a certain date in his year of claim, which date differs in England, Scotland, and Ireland. The lodger is not disqualified, in England and Ireland at least, because he has occupied different lodgings of the requisite value in the same house, nor because he occupies them jointly with another lodger if the aggregate value is sufficient. The lodger franchise was created for English boroughs by the Act of 1867<sup>6</sup>, for Scotch and Irish boroughs by the Acts of 1868<sup>7</sup>, and for counties in England, Scotland, and Ireland in 1884<sup>8</sup>.

The difficulty of distinguishing between the householder and the lodger has proved almost insurmountable, but the distinction is important because the overseer is bound to

<sup>1</sup> 31 & 32 Vict. c. 48, s. 3.

<sup>2</sup> 32 & 33 Vict. c. 41.

<sup>3</sup> 48 Vict. c. 3, s. 9, sub-s. 7.

<sup>4</sup> 31 & 32 Vict. cc. 48, 49.

<sup>5</sup> 48 Vict. c. 3, ss. 2, 3.

<sup>6</sup> 41 & 42 Vict. c. 26, s. 14.

<sup>7</sup> 30 & 31 Vict. c. 102, s. 4.

<sup>8</sup> 48 Vict. c. 3, s. 2.



see that the householder is registered, whereas the lodger will not be registered as a voter unless he claims his right every year.

The fact that the landlord resides on the premises does not turn the occupying tenant into a lodger; nor does the residence of the landlord elsewhere make the occupying tenant a householder<sup>1</sup>. The question must be answered by ascertaining whether the landlord exercises a control over the premises which is inconsistent with the position of the occupier as a householder<sup>2</sup>, and this is a question of fact as to which the revising barrister, upon objection taken, must satisfy himself in every individual case<sup>3</sup>.

Ancient franchises reserved.

There still exist two ancient franchises reserved by the successive Reform Acts of the century: the 40s. freehold qualification in certain towns which are counties under conditions laid down in § 18 of the Reform Act; and the qualification as burgess or freeman in those towns in which, prior to 1832, such a qualification gave a right to vote. But the Reform Act of 1832 imposed restrictions as to residence and the mode of acquiring the freedom which have not been relaxed. The freeman must have acquired his freedom by birth or servitude, and must during the year preceding the date of his claim to registration have resided in or within seven miles of the borough.

The City of London.

In the City of London this franchise still holds, but with some variations from the above rule<sup>4</sup>. It is not enough to be a freeman of the City; in order to qualify, the voter must also be a liveryman of one of the City Companies. He may further acquire the freedom by purchase, and may reside within twenty-five miles of the place of poll.

30 & 31  
Vict. c.  
102, s. 46.

The Universities.

The only qualification which remains to be noted is that which confers the right to vote for a University constituency. Graduates on the electoral roll of Oxford,

<sup>1</sup> *Bradley v. Baylis*, 8 Q. B. D. 219.

<sup>2</sup> *Bradley v. Baylis*, 8 Q. B. D. 241, 242; *Kent v. Fittall* [1906], 1 K. B. 60.

<sup>3</sup> *Kent v. Fittall* (No. 3) [1909], 1 K. B. 215.

<sup>4</sup> *Crouch v. Brown*, 2 C. B. 97.

Cambridge, Dublin, and London; the Chancellor, the Professors, the members of the University Court and General Council of Edinburgh, Glasgow, St. Andrews, and Aberdeen are qualified to vote for their respective Universities if of full age and not subject to any legal incapacity.

It remains to summarize the effect of recent legislation Summary. on the franchise.

*Property* constitutes a qualification in counties only, with the exception of a few towns, in England, which are counties. As this qualification is wholly untouched (except in the provisions relating to fagot votes) by the Act of 1884, the rules respecting it have to be sought in various statutes ranging from 1430 to 1884.

*Occupation* is now required to be of lands or tenements of a uniform value in towns and counties throughout the United Kingdom, but the conditions of the qualification have to be sought in the previous Acts which deal with the representation of the people; they differ in towns and counties, and the test of value is different in each of the three kingdoms.

*Residence*, as a householder or lodger, is now a uniform qualification in counties and boroughs throughout the United Kingdom; the difficulties respecting these franchises consist in the ascertainment of the law respecting rating, on which the household franchise depends, and in the distinction of a householder from a lodger.

### § 6. *Incapacities and Disqualifications.*

1. The franchise is limited in the first instance to persons Sex. of the male sex. The question of the common law disability of women to exercise the franchise arose incidentally upon the interpretation of s. 3 of the Representation of the People Act, 1867. The word 'man' is there used to describe the persons entitled to vote; the Reform Act, 1832, has used the words 'male person' for this purpose, and in the mean time an Act (13 & 14 Vict. c. 21) had provided that 'in all Acts words importing the masculine gender shall be deemed and taken to include females unless

the contrary is expressly provided.' But the Court of Common Pleas held firstly that since the Acts of 1832 and 1867 were to be read together, the words used in the Act of 1832 amounted to an express provision that 'man' did not include 'woman' in the Act of 1867; and secondly that the qualification was conditional on the absence of legal incapacity, and that women were at Common Law incapable of exercising the Parliamentary franchise<sup>1</sup>.

The question was again raised on appeal to the House of Lords from the Court of Session, Scotland, in 1908. It was contended that women graduates of the Scotch Universities were entitled to vote at an election of University members. The ladies, who argued their own case, contended that they were 'persons whose name was on the register of the general council of their University' and thus acquired the qualification conferred on such persons by the Representation of the People (Scotland) Act, 1868. But it was held that 'persons' could not be held to include women unless by express words signifying that they were intended to be so included; and further, that the words were limited in the section quoted to 'persons not subject to any legal incapacity'<sup>2</sup>.

Age.

2. Infancy, whether or no it be a disqualification at Common Law, is made a disqualification by 7 & 8 Will. III, c. 25, s. 7, and by subsequent Acts extending the franchise to persons who were not capable of exercising it when that Act was passed.

A man is supposed to attain full age at the end of the last day of his 21st year; and, as the law takes no account of parts of a day, he may thus exercise the franchise on the day before his 21st birthday.

Peerage.

3. No Peer other than a Peer of Ireland who has been actually elected and is serving as a member of the House of Commons has a right to vote. This disability appears to have rested on usage, and on repeated resolutions of the House of Commons, which though they could not

<sup>1</sup> *Chorlton v. Lings*, L. R. 4 C. P. 374.

<sup>2</sup> *Nairn v. University of St. Andrews* [1909], A. C. 147.

make the law must be regarded as high authority on the rules of electoral law; it is now finally settled by a decision of the Court of Common Pleas in 1872 upon the appeal of Earl Beauchamp against the overseers of Madresfield<sup>1</sup>. 'Upon the authorities as well as upon principle,' said Bovill C. J., 'I am clearly of opinion that a peer of Parliament has no right to vote in the election of members of the House of Commons<sup>2</sup>.'

4. Returning officers are not entitled to vote unless the votes for two candidates should be equal, in which case the returning officer, if a registered elector for the constituency, has a casting vote. Returning Officer.

5. Employment of certain kinds is a disqualification. Employment.  
The disabilities formerly imposed on revenue, excise, and stamp officers were removed in 1868 and 1874, those which attached to the police in England and Scotland were removed in 1887. But there are still in Ireland disqualifications attaching to police and police officials<sup>3</sup>. The disabilities connected with employment may now however be said to rest, at the present day, almost entirely on employment for the purpose of an election.

An agent, canvasser, clerk, messenger, or person in any sort of employment for purposes of an election, may not vote<sup>4</sup>: his vote may be struck off on a scrutiny<sup>5</sup>, and the voter commits a misdemeanour. At elections.

In Scotland the assessors of burghs and counties<sup>6</sup>, a part of whose duties it is to attend to the registration of voters,

<sup>1</sup> L. R. 8 C. P. 252.

<sup>2</sup> This disability must be distinguished from the convention by which peers take no part in the election of members to serve in the House of Commons. A *sessional* order of the House of Commons declares that it is 'a high infringement of the liberties and privileges of the House for any Lord of Parliament or other peer or prelate . . . to concern himself in the election of members to serve for the Commons in Parliament.' A *sessional* order of the House of Commons cannot of course affect the legal rights of persons outside the House, and would be in abeyance during a prorogation or dissolution of Parliament. The abstention of peers from political action at such times must be regarded as an act of courtesy extended by one House to the other.

<sup>3</sup> 6 & 7 Will. IV, cc. 13, 29.

<sup>4</sup> 30 & 31 Vict. c. 102, s. 11. 31 & 32 Vict. cc. 48, 49, s. 8.

<sup>5</sup> 35 & 36 Vict. c. 33, s. 25.

<sup>6</sup> 19 & 20 Vict. c. 18, s. 8. 24 & 25 Vict. c. 83, s. 13.

are disqualified from voting for the constituency in which they are employed.

Aliens.

6. An alien is disqualified from voting by the rules of Common Law; and from the rights conferred upon aliens by the Naturalization Act of 1870<sup>1</sup> are expressly excepted the right to qualify, unless naturalized, for any office, or parliamentary or municipal franchise.

Mental  
unsound-  
ness.

7. The right of a person of unsound mind to vote must depend upon the kind and degree of his mental infirmity. An idiot would unquestionably be disqualified; a lunatic, if so found upon commission, would probably be held to be disqualified; the question has not arisen, and the cases decided appear to relate to persons of known unsoundness of mind who were nevertheless not regarded as wholly incapable of other business. Their votes were allowed<sup>2</sup>.

Convic-  
tion of  
felony;

8. Conviction of treason or felony is a disqualification, unless either the term of punishment has been served or a free pardon has been obtained<sup>3</sup>. Corrupt practices at a parliamentary election are only a misdemeanour (except in the case of personation, which is felony), but a conviction for corrupt practices disqualifies the offender for seven years for voting at any election<sup>4</sup>. A candidate or agent guilty of certain illegal payments, or hirings not amounting to corrupt practices, is disqualified for that place for five years.

of corrupt  
practices.

9. No one is entitled to be registered as a voter who has been within the twelve months next preceding the fifteenth day of July in each year in receipt of parochial relief or other alms such as 'by the law of Parliament now disqualify from voting<sup>5</sup>.'

Alms.

But this disqualification does not now extend to parochial relief given in the form of medical or surgical assistance<sup>6</sup>.

It is not easy to determine what alms, other than parochial relief, disqualify; but it seems safe to say, on the authority of *Harrison v. Carter*<sup>7</sup>, that it is not the character of the alms or the position of the person distributing them

<sup>1</sup> 33 & 34 Vict. c. 14.

<sup>2</sup> See cases collected in Rogers on Elections, ed. 16, vol. i, p. 194.

<sup>3</sup> 46 & 47 Vict. c. 51, ss. 6, 10.

<sup>4</sup> 33 & 34 Vict. c. 23, s. 2.

<sup>5</sup> 2 & 3 Will. IV, c. 45, s. 36; 30 & 31 Vict. c. 102, s. 40.

<sup>6</sup> 48 & 49 Vict. c. 46.

<sup>7</sup> 2 C. P. D. 26.

but the condition of the voter who receives them, which determines the right to vote. Where alms are given to persons who would, but for the receipt of such alms, come upon the parish, it is obvious 'that persons in that position are just the persons who are most likely to be susceptible of manipulation for a purpose which the legislature has always been anxious to discourage, and peculiarly open to a temptation from which this enactment was meant to shield them <sup>1</sup>.'

It will be noticed as resulting from the definition of the Property qualification in counties that it would be possible to multiply votes by the creation of a great number of small freeholds, each worth forty shillings a year. The practice was met by Acts passed early in the eighteenth century <sup>2</sup>, by which the splitting of interests in houses and land with a view to the multiplication of votes for election purposes was forbidden, and conveyances made with such intent were declared void. But the fraudulent intention was made the ground of avoidance, and the Act was held to extend only to conveyances not intended to give any real interest, made for the purpose of a particular election, and with an understanding that the property should be reconveyed when the transaction had served its turn. The legislation of 1832 dealt with such fictitious qualifications in two ways. First, by requiring in the case of all qualifications that the voter should have possessed them for twelve months before the date of registration, and next by limiting, in the mode described above, the conditions under which the forty-shilling freehold should constitute a qualification. Fagot votes.  
Reform Act.  
Supra,  
p. 106.

Still, so long as a rent charge or a joint tenancy gave the franchise, it was easy for a landowner to multiply estates of inheritance, such as would confer votes, without materially inconveniencing himself in the enjoyment of his property. Rent charges.

The Representation of the People Act, 1884 <sup>3</sup>, has put

<sup>1</sup> *Harrison v. Carter*, 2 C. P. D. 26, and see *Cowen v. Town Clerk of Kingston upon Hull* [1897] 1 Q. B. 273.

<sup>2</sup> 7 & 8 Will. III, c. 25; 10 Anne, c. 23, s. 1.

<sup>3</sup> 48 Vict. c. 3, s. 4.

Joint  
occupiers.

an end to this practice by enacting that no man shall be entitled to vote in respect of a *rent charge* except the owner of the whole of the tithe rent charge of a rectory, vicarage, or chapelry; and also that where two or more are owners as joint tenants, not more than one, if his interest is sufficient, shall vote, unless the joint tenancy has been acquired by 'descent, succession, marriage, marriage settlement, or will,' or where the joint tenancy is in the actual occupation of the owner for the purpose of carrying on trade or business. Joint *Occupation*, as opposed to joint *Ownership*, was dealt with, so far as concerns counties, by the Acts of 1867 and 1868<sup>1</sup>, which provided that joint occupiers, if the aggregate value of the tenement sufficed, might vote to the number of two, but not more, unless the tenement had been acquired in one of the modes above described.

In cities and boroughs joint *occupation* is regulated by 2 & 3 Will. IV, c. 45, s. 29, and any number of joint occupiers of land or tenement, if the value of the land or tenement be sufficient to give a qualification to each, may vote in respect of the same premises.

### SECTION III

#### HOW THEY MAY CHOOSE

##### § 1. *Distribution of Seats.*

First it is necessary to ascertain what are the constituencies which choose members for the House of Commons. The present distribution of seats depends upon very recent legislation, but it is necessary to indicate, however slightly, the shares of representation which different parts of the country respectively enjoyed at different periods before the Act of 1885.

48 & 49  
Vict. c. 25.

To the Model Parliament of 1295 were summoned two knights from each shire, two citizens from each city, two burgesses from each borough; and it seems clear that the sheriff directed his precept to such towns as he considered qualified within the terms of the writ.

30 & 31 Vict. c. 102, s. 27; 31 & 32 Vict. c. 48, s. 14.

The county representation underwent little alteration down to 1832; it was varied only by the addition of counties previously unrepresented. In 1536 Monmouth acquired the right to send two members, and each Welsh county one. The counties palatine of Cheshire and Durham were placed on a footing with the others in respect of representation in 1543 and 1673 respectively. The Union with Scotland added thirty members for counties, out of a total addition of forty-five, and the Union with Ireland sixty-four out of a hundred.

Number  
of county  
members.

But the number of represented boroughs fluctuated considerably during the middle ages. In the reign of Edward I 166 were summoned to return members, but the normal or average number which actually sent members appears to have been 99, of which London assumed, and by custom acquired, the right to return four.

Number  
of borough  
members.

The towns were not very anxious to return members, for the members had to be sent to Westminster or wherever the Parliament assembled, and maintained at the expense of their constituents<sup>1</sup>. Again, for purposes of taxation, the borough which returned members was rated higher than the county in the proportion of a tenth to a fifteenth<sup>2</sup>, while the town which returned no members shared the rating of the county. And in addition to the unwillingness of the towns we must take into account the action of the

Causes of  
fluctuation.

<sup>1</sup> The payment of their members appears to have been a common law liability of the constituencies. The knights, citizens, and burgesses took home with them their writs *de expensis levandis* as a matter of course at the conclusion of a session. The customary charge was 4s. a day for a knight of the shire and 2s. a day for a citizen or burgess, and these charges were secured by 35 Hen. VIII, c. 11 (repealed 1856), in the case of the newly enfranchised counties and towns in Wales and Monmouth. As a seat in Parliament became more of an object of ambition, members promised, at elections, to serve without payment (4 Parl. History, p. 843). The right remained in existence, and in 1681 Lord Nottingham decided in favour of a member for Harwich who sued his constituents for his wages. Lord Campbell, writing in 1846, expresses an opinion that the common law right survives, and that a member might still insist upon the wages fixed by ancient custom; but it may be doubted how far the old liability would attach to the new constituencies created by successive Reform Acts. *Lives of Chancellors*, iii. 420.

<sup>2</sup> Stubbs, *Const. Hist.* iii. 427.



sheriff, who might withhold the writ, sometimes arbitrarily, sometimes because a town had become depopulated or decayed.

Royal  
additions.

Large additions to the borough representation were made during the reign of Henry VIII and onwards until the reign of Charles II. Some towns were added by royal charter; some by statute; some petitioned for the revival of rights which had lain dormant for centuries. In the reign of James I there was a strong tendency to revive such ancient and forgotten rights of representation, and the House of Commons resolved on the 4th of May, 1624, 'that a borough cannot forfeit this liberty of sending burgesses by non-user.'

Changes of  
character.

It is impossible to doubt that, of the boroughs added by royal charter, many were added not because of their importance, or for the value of their voices in the deliberations of Parliament, but because from their smallness and lack of political interest they could be relied upon to return nominees of the Court. And in addition to the boroughs which were never intended to express a free opinion in politics, there were those which had once been thriving ports or seats of manufacturing industry, which had dwindled and decayed as wealth and commerce moved northwards, and had fallen under the influence of a great landowner or proprietor of boroughs; or again it happened sometimes that the nature of the franchise might be such as to deprive the representation even of a large and thriving town of any value in so far as it meant the expression of local opinion.

It would be easy to multiply illustrations of the smallness, the corruption, the non-representative character of the constituencies which existed before 1832. It is enough to say that it was alleged, and with apparent truth, at the end of the eighteenth century, that 306 members were virtually returned by the influence of 160 persons; it is certain that the Reform Bill of 1832 had to deal with nine boroughs in which the constituencies did not exceed fifteen voters.

Effect of  
reforms of  
1832, 1867.

The Reform Act of 1832 and the Representation of the People Act of 1867 both tended to diminish or take away

the representation of those places which had ceased to express any local or mercantile or political interest, and to give members to those places which from their population or importance had acquired a fair claim to be represented in Parliament.

There is no great object to be gained by following in detail the transference of political power from landowners and boroughmongers to communities where numbers, interests, and wants called for representation. The following table will show the distribution of seats which existed before the Reform Bill of 1832, and the mode in which Scotland and Ireland have acquired representation at the expense of England.

Changes  
of nine-  
teenth  
century.

1832.					1832.
England and Wales	.	.	.	513	
Scotland .	.	.	.	45	
Ireland .	.	.	.	100	
					658
1832. By 2 & 3 Will. IV, cc. 45, 65, 88.					
England and Wales	.	.	.	500	
Scotland .	.	.	.	53	
Ireland .	.	.	.	105	
					658
1867. By 30 & 31 Vict. c. 102.					
1868. 31 & 32 Vict. cc. 48, 49.					
England and Wales	.	.	.	495	
Scotland .	.	.	.	60	
Ireland <sup>1</sup>	.	.	.	103	
					658
1885. By 48 & 49 Vict. c. 23.					
England and Wales	.	.	.	495	
Scotland .	.	.	.	72	
Ireland .	.	.	.	103	
					670

The Reform Act of 1832 may, in its process of disfranchisement, be compared with the Redistribution Act

<sup>1</sup> Two Irish seats which had suffered temporary disfranchisement were now permanently left out.

of 1885, though the reasons and the results of the disfranchising process are widely different.

The Act of 1832 a disfranchising measure.

The Reform Act had to deal with a great number of constituencies which had ceased to represent anything but the caprice or ambition of a few individuals. It disfranchised in England alone 56 boroughs absolutely, and 31 to the extent of depriving each of one member. The seats thus taken from the rotten boroughs were given to counties and large towns, on the principle that the representation of the country in Parliament should not be the representation of numbers only, but of communities in which the population was numerous: indeed it was impossible that representation should be other than local, so long as the franchise in counties differed from the franchise in towns. And for this same reason, until the franchise was made uniform, a measure of redistribution was necessarily a measure of disfranchisement. Where a borough ceased to return members its electors did not merely cease to have a member to themselves; with the exception of those who might possess the county qualification, they ceased to be electors at all.

The Act of 1885 disfranchises localities,

The Redistribution Act of 1885 has deprived in England 79 boroughs of their separate representation, in Scotland 2, in Ireland 22. It has deprived 36 boroughs in England and 2 in Ireland of one member each, and has taken one member from the county of Rutland.

but not electors.

But the Redistribution Act does this without disfranchising a single elector, though it may alter his constituency and diminish the relative importance of his vote. Since the qualifications by occupation and residence are now made uniform in county and borough, the borough which ceases to return a member drops into the county constituency in which it is geographically situate; its electors become electors for that division of the county.

Is based on numbers.

The Redistribution Act of 1885 differs from its predecessors in that it departs to a great extent from the principle of local representation, and is professedly based on an attempt to divide the members, with a rough attempt at equality, among the population.

Before the Act became law the average throughout the country of population to members was, in counties, 78,000, in boroughs, 41,200, to a member. But this proportion was not preserved: for instance, 79 boroughs in England, with populations under 15,000, each returned a member, and 36 boroughs, with populations under 50,000, each returned two members.

Excep-  
tions.

The Redistribution Act, while retaining the representation of the Universities, and making some sacrifice of principle in favour of local representation, establishes as a basis of calculation the assignment of a member to every 54,000 of population. All towns with a population of less than 15,000 were thrown into their respective counties, whether or no they have previously returned members. Towns which have more than 15,000 inhabitants and less than 50,000 return one member; those which have more than 50,000 and less than 165,000 return two members; and beyond this an additional member was given for every additional 50,000 of population; and the county representation is based in like manner upon numbers. No provision was made for readjustments which changes of population might render necessary, and numerical anomalies, which in the case of the representation of Ireland were always conspicuous, have increased in course of time. The Walthamstow division of Essex has 31,521 registered electors, the Romford division of that County has 45,579. Each returns one member: so does Newry with 1,905 and Kilkenny, with 1,533.

Basis of  
calcula-  
tion.

But the Redistribution Act makes a further change and departure from the traditions of our representative system; a change which follows not unnaturally from the attempt to proportion members to population throughout the country. Except in the cases of the Universities of Oxford, Cambridge, and Dublin, of the City of London, which is reduced from four members to two, and of those towns which have hitherto combined the possession of two members with a population between the limits of 50,000 and 165,000, the constituencies return one member apiece. For instance, Wolverhampton, which returned two members,

Single-  
member  
constitu-  
encies.

receives an additional member, and is cut into three wards or constituencies. Liverpool, which returned three members, now returns nine, and is divided into as many constituencies. Lancashire, which returned eight members in four divisions, now returns twenty-three members in twenty-three divisions. Except in the cases which I have named as exceptions, in which the principle of the 'community has still been preserved,' the Act adopts, said Mr. Gladstone<sup>1</sup>—

'not absolutely as a uniform, but as a general and prevailing rule the system of what is known as one-member districts. The one-member district is, as far as England is concerned, almost a novelty, because in a system of representation which counts and reckons more than six centuries of life, what began at the Reform Bill<sup>2</sup> may be considered almost a novelty. The recommendations of this system are, I think, these—that it is very economical, it is very simple, and it goes a very long way towards what is roughly termed the representation of minorities<sup>3</sup>.'

### § 2. *Registration.*

Registration.

It is a condition precedent to the exercise of the right to vote that the voter should be upon the Register. This preliminary to the enjoyment of the franchise was first introduced when the franchise was remodelled in 1832, and the rules respecting it have been dealt with by various statutes. As this book is not a manual of election law I do not propose to go into the rules of Registration in detail. It is enough to describe the practice in outline for England, as settled by the Registration Act, 1885<sup>4</sup>.

Duties of Clerk of the peace ;

It is the duty of the clerk of the peace in a county, of the town-clerk in a borough, to send to the overseers of every

<sup>1</sup> Hansard, 3rd Series, vol. cxciv, p. 380. Debate of Dec. 1, 1884.

<sup>2</sup> This is not strictly accurate. Edward IV gave by charter the right of returning one member to Wenlock. The Welsh counties and county towns and the town of Monmouth each returned a member under 27 Henry VIII c. 26; so did Abingdon, Bewdley, Higham Ferrers, and Banbury, enfranchised, the first two by Mary, the last by James I.

<sup>3</sup> It can hardly be said that in the elections which have taken place since 1885 the representation of minorities has been a conspicuous feature.

<sup>4</sup> 48 Vict. c. 15.

parish or township, on or within seven days of the 15th of April in each year, a precept. The precept contains a description of the qualifications which entitle persons to be registered as voters, and the order and dates of the things which the overseer is required to do. By following the chief instructions conveyed in this precept we may obtain some knowledge of the process of registration.

The overseer must in April or May ascertain who is of the entitled to be registered as an inhabitant occupier of a <sup>overseer,</sup> rated dwelling-house, and must enter the names of such persons in a column of the rate-book. And if rateable property is not rated, the overseer must act in respect of the inhabitant occupiers of it as if it was rated. (41 & 42 Vict. c. 26, s. 14.)

Before the 20th of June he must publish, if in a county in respect of constituency, the existing register of ownership voters, and <sup>of owners,</sup> must give notice to any £10 occupier who has not paid his rates.

Before the 22nd of July he must make out a list of such of occupiers as, not having paid their rates by the 20th of <sup>piers,</sup> July, are disqualified. And before the 31st of July he must ascertain from the relieving officer of the parish the names of all persons disqualified by receipt of parochial relief.

Before the 31st of July he must also make out a list of occupiers, that is, of all persons whom he has ascertained to be qualified as £10 rated occupiers, as inhabitant occupiers, and, if in a county, as £50 rental occupiers<sup>1</sup>. He must make out a list of lodgers already on the register *who have* of lodgers. *sent in their claims to appear* in respect of the same lodgings; and, if in a county, a list of ownership claimants.

By the 20th of August all new claims have to be sent in, and the lists, together with notices of objections, have to be published on the door of every church or public chapel in the parish.

By the 25th of August the lists of occupiers and old Claims

<sup>1</sup> The provision of the Act of 1832, which created this qualification, was expressly repealed by the Act of 1884, but the rights of persons entitled to be registered under this qualification were saved by s. 10 of that Act.

and objections. lodgers, and of claims and objections, must be sent by the overseer to the town-clerk in a borough, to the clerk of the peace in a county, with the addition of a copy of the ownership register, and of lists of claims and objections in respect of ownership.

The Revising Barrister, In September the Revising Barrister comes round and adjudicates upon disputed claims and objections to names existing on the Register: from his decision an appeal lies, on a case stated by him, to the King's Bench Division of the High Court, and on the result of the revision the Register is made out, containing three lists if it is for a county, two if it is for a borough. These are lists of ownership, occupation, and lodger voters; the ownership list is omitted in boroughs. The Register, thus made up, comes into force on the ensuing 1st of January, unless accelerated by special legislation.

the Register,

It will be seen that much care is taken in these provisions on behalf of the occupier. The ownership voter must claim in order to get on to the Register, but once there he need not make a fresh claim. The lodger voter has to claim afresh every year. The occupier is privileged to be entered by the overseer on the occupiers' list without needing to make a claim.

how far conclusive.

A man therefore who desires to vote for a county or borough must first obtain some one of the qualifications which have been set forth above, and next he must ensure that his name is placed upon the Register. But he may be subject to disqualifications which, if known and urged before a Revising Barrister, would have disentitled him to be placed upon the Register; and it has been questioned how far the evidence furnished by the Register is conclusive not only upon the returning officer who receives the votes, but upon the Court which may have to inquire into the validity of elections.

35 & 36  
Vict. c. 33,  
s. 7.

The question turns on the construction of s. 7 of the Ballot Act, which enacts that no one shall be entitled to vote whose name is not on the Register; that every one shall be entitled whose name is on the Register, but that 'nothing in this section shall entitle any person to vote

who is prohibited from voting by any statute or by the common law of Parliament.'

And this exception to the conclusiveness of the Register has been interpreted not to include 'receipt of parochial relief, non-residence within proper distance of the borough, non-occupation, insufficient qualification.' 'It does not mean persons who from failure in the incidents or elements of the franchise could be successfully objected to on the revision of the Register: it means persons who from some inherent or for the time irremovable quality in themselves have not, either by prohibition of statute or of common law, the status of parliamentary electors<sup>1</sup>.'

The votes of such persons might be rejected by the returning officer, or if accepted by him might be struck off at a scrutiny upon an election petition.

Thus an undergraduate of full age who, in default of objection, was placed on the Register of parliamentary voters for the City of Oxford in virtue of the occupation of college rooms, would be entitled to vote. Not so an infant undergraduate in a like position.

### § 3. *Mode of Election.*

The process by which an election is made has been described, in its preliminary stages, in an earlier chapter. It has been described up to the point at which the returning officer<sup>2</sup> receives the writ directing him to procure an election. As the process of election is now governed by the Ballot Act of 1872, it is worth noting that the changes effected by that Act, apart from details of pro-

Effect of  
the Ballot  
Act.

<sup>1</sup> *Stones v. Jolliffe*, L. R. 9 C. P. 734.

<sup>2</sup> The returning officer for a county, or town which is a county, is the sheriff, or a deputy appointed by him where there are divisions of the county and the sheriff does not act in all. In boroughs which are incorporated the mayor is the returning officer; in others a returning officer is provided by statute, or appointed by the sheriff. In the Universities of Oxford, Cambridge, and London, the Vice-Chancellor is the returning officer; in the University of Dublin the Provost; for Edinburgh and St. Andrews the Vice-Chancellor of the University of Edinburgh; for Glasgow and Aberdeen the Vice-Chancellor of the University of Glasgow.



cedure, relate to the publicity (1) of the nomination, (2) of the poll. Until that date the nomination took place at a hustings. The candidates were proposed and seconded in commendatory speeches, addressed for the most part to a casual crowd, chiefly composed of persons who were not entitled to vote. The candidates explained their political views, and, if the election was contested, a show of hands was demanded by the returning officer. Whatever the result of the show of hands it had no effect on the election. A poll was demanded on behalf of that candidate for whom fewest hands were held up, and on the days and at the place fixed for the poll the voters announced publicly the name of the candidate for whom they desired to vote. The disorders of the nomination and the possible intimidation of voters who voted openly were the evils which the Ballot Act was designed to remedy.

Rules of  
Election.

The present provisions of the law with respect to the conduct of an election depend upon the Parliamentary and Municipal Elections Act, better known as the Ballot Act, of 1872<sup>1</sup>. The returning officer, upon the receipt of the writ (of which a form was set out on page 57), must give notice of the day and place of election, and of the poll if the election is contested; and he must do so, in the case of counties, within two days of receiving the writ, in the case of boroughs, on the day of its receipt or the following

The nomi-  
nation.

day. The election must take place, in the case of counties within nine days, in the case of boroughs within four days, from the receipt of the writ, and within those limits the returning officer may fix the day. The candidates have to be nominated on the day fixed for the election by the returning officer. The nomination is made in writing, each candidate being proposed and seconded by a registered elector for the constituency; the names of eight other registered electors must be affixed to the nomination paper as assenting to the nomination.

The poll.

If within an hour of the time fixed for the election no more candidates are nominated than there are vacancies,

<sup>1</sup> 35 & 36 Vict. c. 33.

the election is then made and the names returned to the Crown office in Chancery. If there is a contest the election is adjourned to a polling day, to be fixed by the returning officer: in a county, not less than two nor more than six clear days—in a borough, not more than three clear days—from the day fixed for the election.

Polling places are to be fixed conveniently as to number and situation by the local authorities, and the poll is to commence at eight in the morning, and conclude at eight in the afternoon<sup>1</sup>. During these hours the voter, qualified and registered as above described, can deliver his vote at the polling place of his district by ballot. A paper is delivered to him containing the names of the candidates, and he places a mark, which he is able to do in secret, against the name or names of those for whom he desires to vote. The paper is placed in a box; at the conclusion of the poll the polling boxes are sent to the returning officer at the place of election, the votes are counted, and the poll declared. The writ is then endorsed by the returning officer with a certificate in the following form:—

I hereby certify, that the members (*or member*) elected for — in pursuance of the within-written writ, are (*or is*) A. B. of — in the county of — and C. D. of — in the county of —

(Signed)

X. Y.

High Sheriff (*or Sheriff or Mayor as the case may be*).

The writ thus endorsed is returned to the clerk of the Crown in Chancery.

In the Universities, English, Scotch, and Irish, the Ballot Act does not apply, and a voter can deliver his votes orally, or by means of a voting paper sent under certain formalities from the place of his residence<sup>2</sup>.

During the day appointed for the nomination or election, or for taking the poll for an election, no soldier within two miles of any place where such nomination or election is made, or poll taken, is allowed to go out of barracks, unless to relieve guard, or to record his vote<sup>3</sup>.

<sup>1</sup> 48 Vict. c. 10.    <sup>2</sup> 24 & 25 Vict. c. 53.    <sup>3</sup> 10 & 11 Vict. c. 21.

#### § 4. *Representation of Minorities.*

It is impossible to pass over the question of the representation of minorities because it has affected in the past, and may affect in the future, the questions of the franchise and the distribution of seats. It is, however, a question of practical politics quite as much as of constitutional law, and I will endeavour to state shortly and without controversial comment the facts relating to the subject.

Representation  
of estates,

of localities,

of classes.

The single-  
member  
constitu-  
ency.

Our Parliament, as conceived by Edward I, was in its origin a representation of Estates: the clergy, the baronage, the commons. The commons were alike representative of shire and town, and the representation was that of the sum of the local interests, which the knights of each shire, and the burgesses of each borough, were bound to promote. Changes in the centres of commerce and industry and the consequent growth and shifting of the population brought with them the need for an extension of the franchise and a redistribution of political power; but they brought with them also a change in the conception of the character of our representation. Greater ease of communication and wider and quicker diffusion of intelligence have tended to efface the distinction of localities; classes and the interests of classes call now to be represented. The wide extension of the franchise gives ground for anxiety lest some of the interests, and most of the intelligence of the community, should be ignored and buried under the mass of votes recorded by electors who go to the poll to support candidates of whom they know nothing or little except that they are chosen by the organization of the party. Each of our constituencies, for the most part, can only choose one man in each to represent it, and the multitude of voters needs some guidance and organization lest a result should be produced which was unsatisfactory to the great majority. But organization may reach a point in which all freedom and variety of thought is extinguished in the requirement of adherence to a programme of doctrines or of fidelity to an individual. The elector may find that he must vote for a man from whom he differs on many points,

on pain of being represented by one from whom he differs on many more. Some means exist, others have been tried, and others again merely suggested, by which the voice of the minority may be ensured a hearing.

Several of the reform bills of the last century contained provisions which would give additional voting power to the educated or the thrifty man. Lord John Russell's bill of 1854, for instance, proposed to confer the franchise on any person who enjoyed a salary of £100 a year or an income of £10 from Government stock; who paid 40s. income tax, possessed a deposit of £60 in the savings bank, or was a graduate of any university <sup>1</sup>. Fancy franchises.

No one of these proposals found its way to the Statute Book, and indeed some of them are open to obvious objection from their fluctuating character and from the risk that they might be created for the purpose of an election.

The plural vote increases the voter's electoral power by The plural vote. allowing him a voice at elections in every locality in which he possesses a property qualification: the qualification is confined to property, and while it retains the principle that the franchise is based upon local interest, it also serves the purpose of those who think, as was thought by Lord John Russell, that the possession of property gives a prima facie claim to political influence.

University representation offers some security that the University representation. higher education should have some one to support its interests in the House of Commons.

These forms of franchise are matters of controversy. It is enough to call attention to the fact that they secure, to some extent, the representation of interests which might otherwise be unheard or silenced.

The 'three-cornered constituency' which existed from 1867 to 1885 was an institution designed not so much to secure hearing for various views and interests as to diminish the power of the majority. Three-cornered constituencies.

In some large constituencies returning three or four members each voter had one vote less than there were seats to fill. The result of this was the return of one

<sup>1</sup> Spencer Walpole, *Hist. of Twenty-Five Years*, i. 186.

member representing the minority, unless the majority was so large and so well drilled as to have enough votes, and enough organization in the use of them, to be able to win all the seats.

A plan of this sort, limited to a few large constituencies, did nothing to secure variety of representative character: it did no more than make the ordinary minority a little larger, and the ordinary majority a little smaller.

The  
cumula-  
tive vote.

A different method in process and in conception was that known as the 'cumulative vote,' a method used in school board elections, while school boards existed, between 1870 and 1903. Every voter had as many votes as there were candidates, and might give them all to one candidate, or dispose them among the candidates as he pleased. This procedure would enable a group of voters to obtain the representation of a special line of thought or policy if they desired it and were prepared to combine for the purpose.

The object of the cumulative vote, in so far as it is based on the desire to secure expression for opinions, perhaps of political importance, which may not be the opinions of the majority in any assignable locality is more fully carried out, if indeed it is attainable, by the adoption of what is known as Mr. Hare's scheme, and by the abolition of local constituencies altogether.

Self-made  
constitu-  
encies.

By this process the number of voters would be divided by the number of seats, and any person would be elected who obtained a number of votes equal to the result of the division. The voter would arrange several candidates in the order of his choice, and his vote would be assigned to the candidate who stood highest on his list, whose number was not yet full. One advantage of the scheme would be that a voter would be less liable to the risk of his vote being thrown away. For it may well happen, under our present system, that a man may be in a permanent minority in the constituency of which he forms a part. Another advantage would be found in the better chance of recognition of exceptional individual merit or of special interests or opinions. But, as Mr. Bagehot has very forcibly pointed out, the scheme, in so far as its machinery did not fall, as

it probably would fall, into the hands of party organizers, would give expression only to extreme opinions whose adherents could muster perhaps one or two constituencies. For the bulk of the voters would be driven by party managers into one of the two party camps because their gradations of opinion would not be so strongly marked, nor their desire to enforce them so keen as to induce them to construct a variety of constituencies, each just off the strict party lines. Where such lines were departed from, the departure would be brought about by the votaries of an impracticable ideal, or by the admirers of the fashionable hero of the hour, and a few fanatics and athletes would enliven an otherwise commonplace assembly.

There remains the modification of Mr. Hare's scheme, known as proportional representation<sup>1</sup>. This as stated in the form in which its advocates desire to see it put into practice involves two important changes. The first is the abolition of the single-member constituency, and the substitution of larger constituencies, numerically equal, and each returning five or six candidates. The second is the transferable vote. The voter would have before him the list of candidates and would number them in the order of his choice. A simple calculation would show the number of votes necessary for an election, and such candidates as secured on the first scrutiny the necessary number, as being the first choice of the necessary number of voters would be elected at once. Next would come those who were the first or second choice of the largest number of voters, and in the end the five or six members whom the constituency was entitled to elect would be chosen. The voter might feel some assurance that if the candidate of his first choice did not need his support, or was so unacceptable as to be ruled out at the beginning, his second, or other choices, might profit by his vote. He would never be in the position of the man whose vote is wasted in a vast majority or a hopeless minority; or who oscillates from

<sup>1</sup> The literature of the Proportional Representation Society is assuming considerable dimensions. For the working of the system in foreign countries see Commons' Papers, 1907 [Cd. 3501].

side to side because no candidate, as may happen under our present system, satisfies his political opinion.

We cannot hope for a Parliament which should mirror every phase of political feeling, and if we could attain to such an ideal we should meet with disappointment, because in an assembly where no proposition could be accepted without abundant qualification it would be difficult to arrive at any conclusions worth reaching. But this system would give a very good chance for the representation in every constituency of such varieties of opinion as had a substantial following.

Effect of  
present  
system,

The practical form which the difficulty assumes under our existing system, may be tentatively stated thus:—The single-member constituencies may produce a variety of representation, but must needs do so by accident; they can only do so when the ward or division of town or county happens to contain a majority of voters of a special class or character. In the great majority of such constituencies candidates are chosen on strictly party lines; and since large bodies of men have some difficulty in coming to conclusions, the candidates of each side are selected by the really eager or extreme representatives of each party in the division.

in limit-  
ing choice.

The electors of such a constituency can only vote for one candidate. They must choose between two, and each one of the two may be the nominee of the most zealous and uncompromising members of the two political parties. It is very possible that to a great many electors the two candidates are alike distasteful. Men of independent judgment may not care to vote for a candidate whose chief recommendation is, that under no circumstances will he withdraw his support from a given statesman, the leader of his party; or that he accepts with implicit faith a set of dogmas or a scheme of proposed legislation drawn up by active party managers. Yet if they do not vote for such a candidate they must vote for his opponent, whose opinions may be yet more distasteful to them, or else they must cease to exercise the privileges of an elector. The advent of a third candidate, usually from outside the two

great political parties, tends rather to confuse the issue than to increase freedom of choice.

It is not desirable that politics should fall entirely into Summary. the hands of party organizers, as may not impossibly happen under our system of single-member constituencies; nor is it well that the voter's choice should be limited to an alternative of political extremes. The question resolves itself into a choice of risks—the risk lest party discipline, which in a large deliberative assembly is practically necessary for the transaction of business, should be too far relaxed by the representation of opinions on a graduated scale; and the risk lest party organization, drawn too close, should exclude from political life practical men who do not care to see opinions pushed to their logical results, and independent men who like sometimes to make up their own minds on the questions of the hour.



## SECTION IV

## PRIVILEGES OF THE HOUSE OF COMMONS

Difficulties of the subject.

The privileges of the House of Commons exist chiefly for the maintenance of the dignity and the independence of that House. The rules of which they consist are not readily ascertainable, for they only obtain legal definition when they are cast in statutory form, or when a conflict between the House and the Courts has resulted in some question of privilege being settled by judicial decision.

Statute law and judicial decision in dealing with this subject are almost entirely concerned with the limitation of the prerogatives of the Crown in favour of the House of Commons, and the limitation of the privileges of the House of Commons in favour of the Courts, and of private rights.

Very recently the Parliament Act has to a great extent defined, and has materially enlarged the privileges of the House of Commons in respect of finance; but this is a matter which concerns the relations of the two Houses, though the public is affected indirectly by the increase in the political power thus acquired by the House of Commons and by the Government of the day. The topic must be referred to in a later chapter. This section deals with the relations of the privileges of the House of Commons to the King, the Courts, and the public.

Officers and procedure.

First, in order to simplify what follows, it is necessary to state that the House possesses certain officers for the general conduct of its business; that through these officers its privileges are enforced, and enforced by process of which the course has been discussed, and the validity admitted by Courts of Law.

Privileges demanded.

Next, we come to the privileges themselves. Of these, some are specifically asserted and demanded of the Crown at the commencement of every Parliament. Three deal more especially with the relations of the House and the Crown—the privileges of free speech, of access to the Crown, and of having the most favourable construction

put upon all their proceedings. One deals with the relations between the members of the House and other subjects of the realm—the privilege of freedom from arrest.

But there are other privileges not specifically mentioned on this occasion, though regularly asserted and enforced by the House. These are, the right to provide for the due constitution of its own body, the right to regulate its own proceedings, and the right to enforce its privileges by fine or imprisonment, or, in the case of its own members, by expulsion. Privileges not demanded.

Lastly, we come to the questions of dispute which have arisen between the House and the Courts, and in some of these it would seem that the House has begun with a misconception of the limitations on its undoubted privileges, and has then endeavoured to cure its error by an arbitrary assertion of exclusive right to define its privilege; in other words, to assume to itself what privileges it pleased. Disputes between House and Courts.

Thus the House has disputed the legality of a legal act, as in *Ashby v. White*<sup>1</sup>, and treated such an act as a contempt; or has endeavoured to legalize an illegal act, as in *Stockdale v. Hansard*<sup>2</sup>. When the right to do these things has been disputed, the House has tried to settle the question off-hand by a resolution that privilege covers the case, and that no Court has jurisdiction to discuss the legality of anything which its vote has ordered.

This is the issue on which the conflict has turned between the House and the Courts. It is safe to say that the Courts have won the day.

The only other question of importance is comparatively technical. It relates to the power possessed by the House to commit for contempt, without assigning any other cause, or any cause at all, in the warrant of commitment, or in the return to a writ of *habeas corpus*. Rules as to commitment.

### § 1. *Officers of the House, and procedure for Contempt.*

A consideration of the privileges of the House of Commons needs some preliminary words as to the position and duties of the Speaker, by whom these privileges are claimed and through whom they are enforced; and as

<sup>1</sup> 2 Lord Raymond, 938.

<sup>2</sup> 9 A. & E. 1.

to the machinery which the House possesses for recording its proceedings and for putting its privileges into effect.

The  
Speaker.

The history of the office of Speaker has been written elsewhere<sup>1</sup>, and needs but a brief notice here. It is plain that the Commons must from the time that they sat apart from the Lords have needed a spokesman to be their medium of communication with the Crown. At any rate, from 1377 there is an unbroken succession of Speakers, described in those days as 'pourparlour,' or 'parlour et procuratour.' Inasmuch as the Speaker was chosen quite as much for these purposes of communication as for the maintenance of order within the House, the Crown claimed and exercised a virtual right of selection, and the Speaker was quite as much the mouthpiece of the Sovereign as of the Commons.

His rela-  
tions with  
the Crown,

A conflict, conducted with a good deal of spirit on both sides, arose between Charles II and the newly elected House of Commons of 1679 on the right to choose the Speaker. The King declined to accept Sir Edward Seymour whom the Commons had chosen and who presented himself for the confirmation of his appointment; the Chancellor desired the Commons to go back and choose some one else, and on returning to their House they were informed whom the King wished them to choose. They declined to accept the royal nominee, and after a conflict of some days' duration a compromise was arrived at, Seymour was passed over, and a Speaker presented who was the independent choice of the Commons. From this time forth the right of the Commons to choose their own Speaker was not contested by the Crown, but for many years after, the Speaker habitually held a government office. Speaker Onslow<sup>2</sup> gave up the office which he held nearly midway through his tenure of the Speakership, in 1742, and thenceforth the practice was discontinued.

with  
party  
politics.

The Speaker, however, remained an active party politician. Addington left the Chair to become Prime Minister. Abbot spoke in Committee on controversial measures, and took the opportunity, on presenting the Appropriation Bill

<sup>1</sup> Porritt, *The Unreformed House of Commons*, vol. i, chaps. xxi, xxii.

<sup>2</sup> Onslow was Speaker from 1727-1761.

at the bar of the House of Lords in 1813, to review the work of the session and to deliver an impassioned harangue against Roman Catholic emancipation. Abbot's conduct was the subject of severe criticism in the House; and his successor, Manners Sutton, when he intervened in debate, did so with some apology for his action. But Manners Sutton, though admittedly an excellent Speaker, was an active politician outside the House; and the Commons by rejecting him at the commencement of the Parliament of 1835 made it plain that they desired to see the Speakership dissociated from party politics. This principle has been uniformly adopted by the lengthening line of distinguished men who have occupied the Chair since Mr. Shaw Lefevre was chosen Speaker in 1839.

The forms of election have varied little since they were virtually settled early in the fifteenth century<sup>1</sup>. For more than a hundred years the Speaker-elect in presenting himself for the approval of the Crown has ceased to ask that some worthier choice than himself should be made; and in the demand of privileges some other changes of no great moment have taken place.

The office is one of high dignity. An Act of 1689 provides that 'the Lords Commissioners of the Great Seal, if not peers, should have and take place next after the peers of the realm and the Speaker of the House of Commons.'

The duties of the Speaker are threefold. He is, firstly, the spokesman and representative of the House; as such he demands its privileges, communicates its resolutions, its thanks, its censures, its admonitions. He issues warrants by order of the House for the commitment of offenders against its privileges, for the issue of writs to fill vacancies among its members, for the attendance of witnesses, or the bringing of offenders to the bar for rebuke or sentence. The symbol of his office is the mace which is laid before him on the table when he is in the Chair, and which, borne by the Serjeant-at-arms, accompanies him wherever he goes in his capacity of Speaker.

<sup>1</sup> *Supra*, pp. 66, 67.

(a) under  
1 & 2 Geo.  
V, c. 13.

Secondly, the Speaker is required under the provisions of the Parliament Act to discharge duties of a judicial or interpretative character.

Money  
Bills.

Under section 2, subsection (2) of the Act he may be called on to decide whether a public Bill purporting to be a Money Bill contains 'only provisions dealing with all or any of the following subjects, namely, the imposition, repeal, remission, alteration, or regulation of taxation; the imposition for the payment of debt or other financial purposes of charges on the Consolidated Fund, or on money provided by Parliament, or the variation or repeal of such charges; supply; the appropriation, receipt, custody, issue or audit of accounts of public money; the raising or guarantee of any loan or the repayment thereof; or subordinate matters incidental to those subjects or any of them.'

The words 'taxation,' 'public money,' and 'loan' do not include taxation, money, or loan raised by local authorities for local purposes, and the duties of the Speaker are confined to the interpretation of Bills relating to imperial finance; but their importance is great.

A decision of the Speaker that a Bill contained matter which brought it outside the definition of a Money Bill would at the same time bring it outside the range of the drastic procedure which the Act provides for Money Bills.

Speaker's  
certifi-  
cate.

Having come to the conclusion that the Bill is a Money Bill within the meaning of the subsection, the Speaker is required to endorse upon the Bill when it goes up to the House of Lords, and again when it is presented to the King for his assent, a certificate that the Bill is a Money Bill, and before giving the certificate he should consult, if practicable, two members to be appointed at the beginning of each Session from the Chairmen's Panel by the Committee of Selection—a matter to be explained presently<sup>1</sup>.

<sup>1</sup> The Committee of Selection, a body of eleven members chosen by the House at the commencement of each Session, appoints the Chairmen and Committees for private bills, nominates members of standing Committees, and a chairman's panel for these Committees. This should be distinguished from the Speaker's panel of members who may take the chair in Committee of the whole House, at the request of the Chairman of Committees. Standing Orders, 48, 49, 1 (9).

The decision of the Speaker on a question of this nature may be of great political importance to the Government of the day, for a Money Bill can be presented for the Royal Assent within one month after it has been sent up to the House of Lords, whereas if the Speaker hold that it is not a Money Bill, the Lords might delay it for two years from the date of its second reading in the House of Commons. The Speaker, therefore, is not merely called upon to assert, as heretofore, the privileges of the Commons, he is required to interpret an Act which limits the privileges of the Lords. And since his interpretation, if unfavourable to the contention of Ministers, might upset their scheme of legislation for the Session, the risk of bringing the Speaker's office into the region of party politics cannot be ignored.

Under section 2 of the Act the Speaker gives a certificate, when the Bill is presented for the Royal Assent, that the requirements of the section have been complied with, and certificates, as to the identity of the Bill, when amendments are made on which both Houses have agreed, or which are formally necessary owing to lapse of time.

Thirdly, the Speaker is the chairman of the House, and in that capacity he maintains order in its debates, decides such questions as may arise upon points of order, puts the question, and declares the determination of the House.

But the Speaker does not act as chairman when the House goes into Committee. The Chair is then taken by the Chairman of Ways and Means, who is chosen at the commencement of each Parliament for the purposes of the Committees of Supply and Ways and Means. He is appointed by the leader of the House moving 'that Mr. — take the Chair.' A deputy-chairman is appointed in like manner. The chairmanship of other committees of the whole House is provided for by a panel of five, chosen for that purpose by the Speaker, who act as temporary chairmen when requested so to do by the Chairman of Ways and Means.

The Chairmanship of Ways and Means is a strictly party appointment, and changes with every change of government. So does the office of deputy-chairman. It is to the credit of

Import-  
ance of his  
decision.

Other  
Public  
Bills.

(3) as  
chairman.

The Chair-  
man of  
Commit-  
tees

and  
Deputy-  
Chair-  
man.

our public life that the rulings of these officers, who are constantly confronted with difficult points of order and of construction, are accepted by their opponents with the assumption that the chairman at any rate desires to be impartial.

Deputy-Speaker.

Difficulties have arisen for want of provision for supplying the place of the Speaker if he should be temporarily disabled by illness or accident from discharging his duties. But these are now met by Standing Orders of the House, passed with the approval of the Crown. If the Speaker is unavoidably absent the clerk informs the House, and the Chairman, or in his absence the Deputy-Chairman, of Ways and Means performs the duties and exercises the authority of the Speaker<sup>1</sup>; and during the daily sittings of the House, which are now continuous throughout their duration, the chairman or deputy-chairman may temporarily take the place of the Speaker when requested to do so by him<sup>2</sup>, while 18 & 19 Vict. c. 84 provides for the validity of acts required by law to be done by the Speaker, but done on such occasions by the deputy-speaker.

Speaker's continuity of office.

The Speaker is appointed afresh at the commencement of every Parliament. It is rare that the appointment should be made the subject of a party division; but, as a matter of fact, whenever the office falls vacant during the existence of a Parliament, the new Speaker is the nominee of the party which possesses for the time a majority in the House. When a new Parliament meets, the House of Commons, after being summoned to the bar of the House of Lords, is desired by the Lord Chancellor, on behalf of the Crown, to choose a Speaker. If a vacancy in the Chair should occur while Parliament is sitting, a minister of the Crown who is a member of the House of Commons acquaints the House of the King's desire that they should choose a Speaker. Either party is capable of producing men qualified beyond reproach to fulfil the duties of the Chair, and the Speaker of the last Parliament has been accepted by the next without opposition since 1835. The need of impartiality created by the judicial duties of a chairman makes the

<sup>1</sup> Standing Orders, 81.

<sup>2</sup> *Ibid.* i (9). *Supra*, pp. 66-68.

House shrink from investing the Speakership with the character of a party appointment.

The Speaker, the great officer of the House, may change as Parliaments change: he may lose his seat in the House at a general election, or be rejected as Speaker by the majority of a new Parliament. But under him there are subordinate offices which are not affected by dissolution of Parliament.

The holders of these permanent offices are the Clerk of the House and his assistants, the Serjeant-at-arms and his deputies, and the Chaplain.

The Clerk of the House of Commons has for his principal duty the record of the proceedings of the House. The Clerk of the House. The Crown appoints him by letters patent under the Great Seal: he is technically styled 'Under-clerk of the Parliaments,' as distinguished from the Clerk of the House of Lords, whose proper title is 'Clerk of the Parliaments.' He signs all orders of the House, endorses the bills sent or returned to the Lords, and reads whatever is required to be read in the House. But his chief duty is to enter the proceedings of the House, and from these to prepare the journals, of the nature of which I shall have more to say later on. Post, p. 179. He has two assistants, clerks appointed by the Crown on the nomination of the Speaker, and removable only upon an address of the House<sup>1</sup>.

The Serjeant-at-arms enforces the orders, as the Clerk records the proceedings, of the House. The Serjeant-at-arms. He too is appointed by letters patent under the Great Seal. He is the attendant of the Speaker when Parliament is sitting; when it is not sitting he may be called upon 'to attend his Majesty's person.'

Inside the House his duties are to attend the Speaker entering and leaving the House, to keep order in its precincts, to bring to the bar of the House persons who are summoned to attend there, or to introduce to the bar persons who are entitled to make communications to the House.

Outside the House he is charged with the execution of warrants issued by the Speaker in pursuance of an order of the House for bringing persons in his custody to the

<sup>1</sup> 19 & 20 Vict. c. 1.



bar, for retaining them in his charge, or committing them to such place of detention as the House may order<sup>1</sup>.

Process for  
enforce-  
ment of  
privilege.

Powers  
of House.

The process by which the House enforces its privileges is by order to attend at the bar, or by order for the Speaker to issue a warrant for bringing the person summoned in custody of the Serjeant, or by a like order for warrant of commitment for contempt. The powers of the House in this respect were described by Parke P. in *Howard v. Gosset*<sup>2</sup>.

‘The House has power to institute inquiries and to order the attendance of witnesses, and, in case of disobedience (whether it has not even without disobedience we need not inquire), to bring them in custody to the bar for the purpose of examination. And, secondly, if there be a charge of contempt and breach of privilege, and an order for the person charged to attend and answer it, and a wilful disobedience of that order, the House has undoubtedly the power to cause the person charged to be taken into custody and to be brought to the bar to answer the charge : and further, the House, and that alone, is the proper judge when these powers or either of them are to be exercised.’

And, in construing warrants issued in virtue of these powers of the House, the rule was held to apply ‘that nothing shall be intended to be out of the jurisdiction of a superior Court, but that which specially appears to be so.’

The powers here referred to will require further discussion and illustration, but this brief statement of their character and the mode of their exercise may make it easier to understand the intervening matter which I have to discuss.

## § 2. *Privileges of the House demanded by the Speaker.*

The claim  
of Privi-  
lege :

The privileges of the House of Commons are claimed at the commencement of every Parliament by the Speaker addressing the Lord Chancellor on behalf of the Commons. They are claimed as ‘ancient and undoubted,’ and are,

<sup>1</sup> For the officers of the House, see May, *Parl. Practice*, ch. vii.

<sup>2</sup> 10 Q. B. 451.

through the Chancellor, 'most readily granted and confirmed' by the Crown.

The practice of claiming these privileges was of gradual growth. As early as the reign of Henry IV, the Speaker demanded in general terms that he might be allowed to inform the King of the mind of the Commons, and that if he made any error in his communication he might have leave to correct himself by reference to the House.

In 1536 there is a definite demand of access to the Crown, in 1541 comes the demand for freedom of speech, and in 1554 for freedom from arrest, together with freedom of speech and of access. The journals during the reign of Elizabeth record for the most part a demand for 'ancient liberties,' or a use by the Speaker of 'ordinary' or 'accustomed' petitions. From other sources<sup>1</sup> we ascertain that these included the three claims first made together in 1554, and the practice seems to have become regular by the end of the sixteenth century.

The privileges claimed of the Crown by the Commons are first expressed generally as 'their ancient and undoubted rights and privileges'; and then 'particularly that their persons might be free from arrests and molestations; that they may enjoy liberty of speech in all their debates; may have access to His Majesty's royal person whenever occasion shall require; and that all their proceedings shall receive from His Majesty the most favourable construction.'

So the House asks for three things: freedom of the person; freedom of speech; and certain rights of a merely formal character. These last admit of brief treatment, and I will take them first; then I will deal with freedom from arrest and freedom of speech; then with certain privileges not expressly demanded by the Speaker; lastly with the limitation of privilege by Courts of Law.

#### (a) *Formal Privileges.*

The House has asked for, and is entitled to, liberty of speech in the matter and manner of debate; it is merely

<sup>1</sup> The best construction.

<sup>1</sup> D'Ewe's Journal, pp. 65, 66.

by courtesy that it asks to have the best construction put upon its proceedings.

Right of  
access.

The right of access is one which the House enjoys collectively, when an address to the Crown is to be presented by the Speaker, and is thus distinguishable from the right of each individual peer, as an hereditary counsellor of the Crown, to have audience of the Sovereign. But the House can communicate with the Crown through such of its members as are Privy Councillors, and can have access to the Sovereign in that capacity; in fact the privilege is only important as a mode of giving emphasis to any communication which the Commons may desire to make to the Sovereign.

The other two privileges specially mentioned are of great practical importance, and confer rights, not only against the Crown, but against the public.

(b) *Freedom from Arrest.*

The first of these is freedom from arrest for the persons of members during the continuance of session, and for forty days before its commencement and after its conclusion.

Object of  
this privilege.

The object of the privilege was doubtless to secure the safe arrival and regular attendance of members on the scene of their Parliamentary duties: the privilege itself may perhaps relate back to the Saxon rule that such persons as were on their way to the *gemot* were in the king's peace. It never was held to protect members from the consequences of treason, felony, or breach of the peace. In 1763 both Houses resolved, in the case of Mr. Wilkes, that it did not extend to the writing and publishing of seditious libels, and since that time the rule has been considered settled that 'privilege is not claimable for any indictable offence'.<sup>1</sup> Nor does privilege protect a member from being committed to prison for contempt of Court. A committee of privileges was appointed to deal with the case of Mr. Long Wellesley in 1831: he had taken a ward in chancery, his own daughter, out of the jurisdiction and had been committed for contempt by the Lord Chancellor, Lord Brougham. The committee

<sup>1</sup> Sess. paper, 1831 (114).

reported that his claim of privilege ought not to be admitted. A series of cases<sup>1</sup> since that date has confirmed the opinion expressed by the Committee of 1831.

But within the limit of civil cases the privilege was made a cause of hardship to suitors, for not only was the member's person protected from arrest and his property from legal process, but rights of action were held in abeyance, since proceedings could not even be commenced against a member or his servant.

The history of legislation on this subject may be briefly noted. In 1603 arose the case of Sir Thomas Shirley, a member of the House, who had been imprisoned in the Fleet. The Commons sent their officer to demand his release, and on a refusal committed the Warden of the Fleet to the Tower for contempt. Sir Thomas was after some time released, and thereon the Warden was reprimanded by the House and was also set free. But a Statute was passed (1 Jac. I, c. 13) which was the first legislative recognition of this privilege, and was also some protection to the suitor and to the keeper of the prison. It provided that the suitor should not lose his right of action because he had once taken his debtor in execution, but that the right should revive after the privilege had expired. It further provided that the officer releasing a prisoner from arrest on claim of privilege should not be charged in any action for allowing his prisoner to escape.

A practice came into use, not long after Shirley's case, of staying proceedings by a letter from the Speaker, in actions commenced against members. Not merely arrest of the person, but distress of goods and the taking of any proceedings at all in an action against a member was regarded as a breach of privilege, unless the member consented to waive his right; and a member's servants were held to be covered by the privilege of their master.

To remedy this hardship on suitors, it was enacted in 1700 (12 & 13 Will. III, c. 3) that suits might be commenced against members and their servants in the principal courts

<sup>1</sup> See cases collected in May, *Parl. Practice* (ed. 11), p. 114.

of law and equity during a dissolution, a prorogation, or an adjournment for more than fourteen days, and that during such times judgment might be given and goods taken in execution.

The Act 2 & 3 Anne, c. 18, provided that penalties and forfeitures against privileged persons employed in the revenue or in any office of public trust, should not be stayed on ground of privilege; and 11 George II, c. 24, extended the effect of the Act of William III to proceedings in any court of record.

But the privilege was not reduced to reasonable limits until 10 George III, c. 50. This statute allowed any action or suit to be commenced and prosecuted, at any time, against members and their servants: and no process thereupon was to be stayed by reason of privilege; only the persons of members were privileged from arrest and imprisonment.

Its present  
extent.

Thus the members' servants entirely lost their immunity, and the members themselves only retained the privilege of freedom from arrest for a period which was said to extend to forty days before and after the meeting of Parliament. This period was long unsettled by statute or judicial decision, though it was generally assumed to include, as well the duration of a Parliament, as the forty days before and after a Parliament sat. It was held in *Mr. Duncombe's case*<sup>1</sup> that long custom, though unexplained, had thus fixed the extent of the immunity. The explanation does not seem very difficult. The privilege was designed to secure the protection of a member *'eundo, morando, et exinde redeundo'*; the old notice of summons required in *Magna Charta* was forty days, and this period would therefore be supposed to cover the utmost time required by a member for coming to a Parliament and returning home.

It should be added, that privilege of Parliament operates to take a member out of custody if he is elected while in custody, always supposing that he is not in custody for an indictable offence or for contempt of Court<sup>2</sup>.

The Speaker continued to include *estates* of members in

<sup>1</sup> *Goudy v. Duncombe*, 1 Exch. 430.

<sup>2</sup> 74 Com. Jour. 44; 75 Com. Jour. 230.

his demand for privileges until the Parliament which met in 1857, and their *servants* until August 1892.

Akin to the privilege of freedom from arrest is the privilege, now always waived, of resisting a subpoena to attend as a witness<sup>1</sup>; and the privilege, now confirmed by statute<sup>2</sup>, of exemption from liability to serve on juries.

(c) *Freedom of Speech.*

This privilege, though claimed as resting upon the ancient custom of Parliament, has been confirmed by judicial and legislative sanction on divers occasions.

In 1397 the Commons adopted a bill laid before them by one Haxey to reduce the charges of the royal household. The King rebuked the Commons for discussing such matters, and demanded the name of the introducer of the bill. The House gave up the name of Haxey with many expressions of regret for his conduct. He was condemned in Parliament as a traitor, and was saved from death only by the interposition of Archbishop Arundel<sup>3</sup>. Haxey's case.

In the first year of Henry IV, Haxey petitioned the King for the reversal of this judgment, as being 'encontre droit et la curse quel avoit este devant en Parlement,' and it was reversed by the King with the advice and assent of the Lords spiritual and temporal<sup>4</sup>.

This amounted to a judicial recognition of the privilege by the Crown and House of Lords; and the Commons further petitioned the King on their own behalf to reverse the judgment 'si bien en accomplissement de droit come pur salvation des libertes de les ditz Communes<sup>5</sup>.' The King assented to their petition, and the judgment was held to be 'wholly reversed, repealed, annulled, and held of none effect.'

In Strode's case, a prosecution was commenced in the Stannary Court against a member who had introduced certain bills for the regulation of the tin mines in Cornwall. He was fined and imprisoned; and thereupon an Strode's case.

<sup>1</sup> May, Parl. Practice (ed. 11), 114.

<sup>2</sup> 33 & 34 Vict. c. 77, s. 9.

<sup>3</sup> Haxey would seem to have been a clerical proctor attending under the *praemunientes* clause. See Stubbs, ed. 4, Const. Hist. ii. 516, footnote 2.

<sup>4</sup> 3 Rot. Par. 430.

<sup>5</sup> 3 Rot. Par. 434.

Act was passed declaring that not only as regarded Richard Strode, but as regarded all members of that or any future Parliament, legal proceedings 'for any bill, speaking, reasoning, or declaring of any matter or matters concerning the Parliament, to be communed or treated of, should be utterly void and of none effect<sup>1</sup>.'

The  
Tudors  
and free  
speech.

1593.

Yet the Tudors and the first two Stuarts were strongly disposed to limit the freedom of speech and matter of deliberation in Parliament. Members whose speech in matter or manner was obnoxious to the Court were summoned before the Council, committed to prison, or forbidden to attend Parliament till further notice<sup>2</sup>. And the royal view of the extent of the privilege is thus defined by the Lord Keeper in reply to the Speaker's petition. 'Privilege of speech is granted, but you must know what privilege you have; not to speak every one what he listeth or what cometh in his brain to utter that; but your privilege is, *aye* or *no*. Wherefore, Mr. Speaker, Her Majesty's pleasure is, that if you perceive any idle heads that will not stick to hazard their own estates: which will meddle with reforming the Church, and transforming the Commonwealth, and do exhibit any bills to such purpose, that you receive them not, until they be viewed and considered by those who it is fitter should consider of such things and can better judge of them<sup>3</sup>.'

The line taken by the Tudor and Stuart sovereigns on this question of freedom of speech shows that the House had to struggle not merely for latitude of discussion, but for the existence of its initiative in legislation and in deliberation. The Crown maintained and the House denied that the Commons were summoned merely to vote such sums as were asked of them, to formulate or to approve legislation or topics of legislation submitted to them, and to give an opinion on matters of policy if, and only if, they were asked for one. A standing protest against this con-

<sup>1</sup> 4 Hen. VIII, c. 8.

<sup>2</sup> 4 Parl. Hist. 149, and Cobbett, Parl. Hist. i. 870; and see Prothero, Statutes and Constitutional Documents, pp. 117-126.

<sup>3</sup> Cobbett, Parl. Hist. i. 862.

tention on the part of the Crown survives in the practice, at the beginning of every Session, of reading a bill for the first time before the King's Speech is taken into consideration. *Ante*, p. 65.

The proceedings in the King's Bench against Eliot, Hollis, and Valentine for seditious speeches in Parliament, and for an assault upon the Speaker, are the last instance of legal proceedings being taken against members of the House in contravention of their privilege of free speech. A conviction was obtained against these men upon the charges made against them, but in the following reign the judgment was reversed in the House of Lords upon writ of error. One cause of error stated was that words spoken in Parliament could only be judged in Parliament and not in the King's Bench; another was that two offences were dealt with by the judgment of the King's Bench, the assault on the Speaker, and the utterance of seditious words in Parliament; and it was alleged that even if the assault was proper to be dealt with by the Court of King's Bench, the words spoken in Parliament could not be dealt with out of Parliament<sup>1</sup>. *Eliot's case.*

The Commons upon this occasion thought it well to resolve that the Act of Henry VIII was not a special Act passed for the benefit of Strode, but a general Act declaring and confirming the existing privileges of the House.

Finally, 1 Will. & Mary, s. 2, c. 2, enacts 'that the freedom of speech and debates or proceedings in Parliament ought not to be impeached or questioned in any Court or place out of Parliament.' *Bill of Rights.*

But though we find no instances after the Revolution of proceedings taken in any Court at the instance of the executive for words spoken in Parliament, yet the free speech and action of members was not unfrequently interfered with, in the case of such as had any office or commission to lose, by a minister like Walpole or a King like George III. It is true that Walpole was trying to create party government by an unscrupulous exercise of party discipline; and that George III wanted to destroy party government by an equally unscrupulous use of royal *Freedom of speech in the 18th century.*

<sup>1</sup> 3 State Trials, 294.



influence; but each wanted to get his own way, and to do so at the expense of freedom of debate.

It is a necessary result of party government that a minister should cease to hold political office if he votes against his party in matters which the leaders of the party do not regard as open questions. No injustice is done, nor any privilege infringed by the dismissal from office of one who has taken office on the terms, not perhaps precisely stated, but none the less clearly understood, that in Parliament he will act in accord with those other servants of the Crown who are responsible for the policy of the country. But an officer in the army or the navy does not hold his commission on the terms that if he should sit in Parliament he will support the King's ministers. Nor does the Lord Lieutenant of a county hold office on these conditions. To take away such offices for speech or vote in Parliament is an invasion of privilege. But neither Walpole nor George III were disposed to brook opposition in Parliament from those whom it was in their power to punish. The case of General Conway in 1764, which was the last of the kind, will suffice for illustration. For opposing the ministry of George Grenville on the question of general warrants, he was dismissed from the King's service, not only as a Groom of the Bedchamber, but also as Colonel of a regiment. 'My overt acts,' he says, 'have been only voting as any man might from judgment only in a very extraordinary and serious question of personal liberty <sup>1</sup>.'

Case of  
General  
Conway.

The practice was very shortly afterwards discontinued; in fact Burke claims credit to the Rockingham ministry of the following year for having 'abolished the dangerous and unconstitutional practice of removing military officers for their votes in Parliament <sup>2</sup>.'

Freedom  
of speech  
controlled  
by the  
House.

Speech and action in Parliament may thus be said to be unquestioned and free. But this freedom from external influence or interference does not involve any unrestrained licence of speech within the walls of the House. The House

<sup>1</sup> Walpole's Letters, ed. Cunningham, iv. 229. Conway to Lord Hertford, 23rd April, 1764.

<sup>2</sup> Short Account of a late Short Administration.

controls the action of its own members, and enforces this control by censure; by suspension from the service of the House<sup>1</sup>; by commitment; by expulsion. Abuse of the forms of debate; irregular or disrespectful use of the King's name; the use of language which is offensive or insulting to either House, or to individual members of either House, or to Parliament collectively, are the offences which may be thus dealt with<sup>2</sup>.

But from the assertion of the privilege of freedom of speech have grown two matters of practice with regard to the presence of strangers in the House, and the publication of its proceedings and debates.

(d) *Freedom of Speech in relation to the Exclusion of Strangers.*

The House has always claimed and enjoyed the right to exclude strangers and to debate with closed doors, and this for two reasons. The first was the inconvenience to which in former times members were put when, owing to the arrangements of the House, it was possible for strangers to come so far within the body of the House, that, on one occasion at least, a stranger was counted in a division<sup>3</sup>. 1771.

The other reason was the possible intimidation which might be exercised by the Crown if reports were made of the speech and action of members, in days when freedom

<sup>1</sup> See Standing Orders for 1907, No. 90.

<sup>2</sup> For a full account of the rules for enforcing order in debate I must refer the reader to May, *Parliamentary Practice* (ed. 11), ch. xii.

<sup>3</sup> *Com. Jour.* 33. 212. After a division on motion made and question put, 'That Mr. Speaker do now leave the chair,' 'it having happened that among the members who were coming in on the division a stranger who had continued in the lobby after it was cleared had come in, and was told as one of the Noes, several members objected to the validity of the division, and insisted that the question ought to be put again and the sense of the House taken. Mr. Speaker immediately on declaring the numbers had ordered the doors of the House to be locked, in order that no member might go forth. The Stranger was then brought to the Bar and examined, and it appearing that what he had done was from ignorance and inadvertency, and without any intention of passing for a member on a division, and being known to several members as a man of good character, he was for the present ordered to be taken from the Bar.' He was afterwards dismissed with a caution.

of debate was not fully recognized as a privilege of the House.

Resolu-  
tion of  
1875.

The custom was that, if a member took notice of the presence of strangers, the Speaker was obliged to order them to withdraw. The custom was found in the year 1875 to work inconveniently: certain members who were connected with the Press thought it wrong that reporters should be present only on sufferance, and endeavoured to reduce the rule to an absurdity by frequent notice of the presence of strangers. The House therefore resolved, after some discussion, 'that if, at any sitting of the House or in Committee, any member shall take notice that strangers are present, Mr. Speaker, or the Chairman (as the case may be), shall forthwith put the question that strangers be ordered to withdraw, without permitting any debate or amendment: provided that Mr. Speaker and the Chairman may, whenever he think fit, order the withdrawal of strangers from any part of the House<sup>1</sup>.'

During the autumn of 1908 the disorderly conduct of some occupants of the ladies' and strangers' galleries caused the Speaker to close these galleries to strangers during the remainder of the Session<sup>2</sup>.

(e) *Freedom of Speech in relation to the Publication of Debates.*

Grounds  
for con-  
trolling  
publica-  
tion.

Following upon the power to exclude strangers, so as to obtain, when necessary, such privacy as may secure freedom of debate, comes the right of the Commons to prohibit the publication of proceedings in their House.

The House of Commons of the Long Parliament was the first to forbid a member 'to give a copy or publish in print anything that he shall speak here without leave of the House<sup>3</sup>': and subsequently printers were warned to give account of the communication to them of matters which took place in the House<sup>4</sup>.

<sup>1</sup> Hansard, 224, p. 55.

<sup>2</sup> They were not re-opened until May, 1909.

<sup>3</sup> Com. Jour. 2, 209.

<sup>4</sup> Com. Jour. 2, 220.

Accounts of the votes and proceedings were ordered in 1680 to be printed under the direction of the Speaker, and the Journals at one time contained something more than a dry record of business actually transacted. But, as early as the close of the sixteenth century, secrecy as to what men said and how they voted was regarded as an obligation upon members; and after the Revolution frequent resolutions forbade the publication of proceedings on pain of incurring the penalties of breach of privilege.

Reporting  
in the 18th  
century.

In 1738, during the ministry of Sir Robert Walpole, the leaders of the three great parties in the House took part in an interesting debate on this subject. Walpole held that it was impossible to be secure against misrepresentation if the report of debates was allowed. Wyndham, the leader of the Tories, thought that 'the public ought to be able to judge of the merits of their representatives.' Pulteney, who led the malcontent Whigs and professed to represent the popular party, took the least popular ground, and said plainly that he would not be 'made accountable without doors for what he said within <sup>1</sup>.'

The fear of misrepresentation was not unfounded: newspaper reporting was in its infancy: nor was there any great desire to represent fairly what was said by politicians whose opinions were opposed to those of the reporter: the best reports of the time are evidently far from faithful reproductions of what passed in the House. But though the House, as the result of the debate just described, condemned the publication of any account of its proceedings as 'a high indignity and a notorious breach of privilege,' the practice of reporting continued.

Down to the year 1771 such accounts of debates as were made public appeared in magazines which came out monthly or quarterly, and after the resolution of 1738 the House and speakers figured under feigned names. But in 1771 notes of debates, by no means careful as to accuracy, began to appear in daily journals; to these reports of speeches the names of the speakers were attached, sometimes with comments and nicknames of an offensive sort. Thereupon

<sup>1</sup> Parl. Hist. x. 811.

the House entered upon a serious and complicated conflict with the Press.

Conflict  
between  
House and  
City, 1771.

In the course of a series of attacks upon printers and publishers, the Commons sent a messenger into the City to arrest a printer of debates; the printer sent for a constable and gave the messenger into custody for assaulting him in his own house. All parties went to the Mansion House, where the Mayor and two aldermen, Wilkes and Oliver, discharged the printer, holding that, by virtue of the City charter, a warrant of the House was of no force within the City unless backed by a City magistrate: but they committed the messenger for an assault, allowing him to go free on bail. The House of Commons sent for the Lord Mayor and the two aldermen, for the Lord Mayor's clerk and the book of recognizances. They erased from the book the entry as to the messenger's recognizances, and committed the Mayor and aldermen to the Tower. A House which could unwarrantably interfere with the procedure of a court of justice was not unlikely to disregard the opinion or the interests of the public. Nevertheless, the Commons were alarmed by the strong feeling exhibited by the people of London on behalf of the City officers, and this was the last occasion on which this privilege was insisted upon. With the impunity accorded to reporters, the practice of reporting has improved, and the House, sensible of the advantages which it derives from a full and clear account of its debates, has given increased facilities to those who report them.

We are accustomed, therefore, to be daily informed, throughout the Parliamentary Session, of every detail of events in the House of Commons: and so we are apt to forget two things.

Reporting  
is on  
sufferance.

The first is, that these reports are *made* on sufferance, for the House can at any moment exclude strangers and clear the reporters' gallery; and that they are also *published* on sufferance, for the House may at any time resolve that publication is a breach of privilege and deal with it accordingly.

The second is, that though the privileges of the House

confer a right to privacy of debate, they do not confer a corresponding right to the publication of debate. Apart from powers conferred by Statute, the right of the House of Commons to publish its proceedings, otherwise than for the use of its members, would be limited by the common law rules as to defamation of character; and it would be no answer to an action for libel brought against the publisher that the libellous matter was a part of a debate in the House of Commons, or was a part of a report made for the use of the House, and printed and published by its order. Still less is a private member entitled to claim privilege for the publication of a speech delivered within the walls of the House. Within those walls he may say what he pleases, and is protected by the general privilege of the House; but if he chooses to circulate outside the House statements made within it, he does so at his peril, and if they contain defamatory matter he will be liable to proceedings for libel.

Limit to right to publish debates.

Privilege cannot legalize defamation.

The extent to which the publication of Parliamentary proceedings has, in this respect, been protected by judicial decision or statutory enactment, may thus be traced.

It was held in *Lake v. King*<sup>1</sup> that an action would not lie for defamatory matter contained in a petition printed and delivered to members, this being agreeable to the course and proceedings of Parliament. And if it is permissible to a private individual to circulate in the form of a petition among members that which would be libellous if published otherwise, it follows, as of course, that no words spoken by a member in the course of Parliamentary proceedings, or papers printed and circulated by order of the House among its members, would be actionable.

Publication by private member,

But directly publication ceases to be limited to the use of members of the House the law of libel takes effect. Mr. Creevy in 1813 made a charge against an individual in a speech delivered in the House. His speech was misreported, and he sent a corrected report to the editor of a local paper. He was held liable to a criminal information for libel.<sup>2</sup>

<sup>1</sup> 1 Saund. 131 [1667].

<sup>2</sup> *R. v. Creevy*, 1 M. & S. 278.

by order  
of the  
House.

Nor is it any defence, at common law, that defamatory statements have been published by order of the House. In the case of *Stockdale v. Hansard*<sup>1</sup> it appeared that the House of Commons had ordered the printing of copies of certain reports, not for the use of members only, but in numbers sufficient to make some copies available for sale to the public. One of these reports contained matter defamatory of the plaintiff. He sued the publisher, and Lord Denman ruled, and the Court of Queen's Bench upheld his ruling, that the House could not by its order legalize 'the indiscriminate publication and sale of all such papers as the House may order to be printed for the use of its members.'

The controversy between the House and the Court of Queen's Bench, of which this decision forms a part, raised a wider question, to be dealt with hereafter, as to the relation of Courts of Law to questions of Privilege. But the case does fix the limits of the right of the House to publish its proceedings on matters connected therewith, and settles that, apart from statutory protection, such publication, if defamatory, is actionable unless it is confined to members of the House. Relief was given in cases of this sort by 3 & 4 Vict. c. 9, which enacts that a certificate from any one of certain officers of either House, verified by affidavit, and stating that the publication was made by authority of the House of Lords or House of Commons, should be an immediate stay of any civil or criminal proceedings taken in respect of defamatory matter contained in the publication.

But a fair  
report is  
privi-  
leged.

Thus far it was settled that statements published by authority of either House, though injurious to the character of an individual, would not give a cause of action for libel. In 1868 a further question arose. The editor of a newspaper, with no hostile or malicious intention, but solely with a view to his own profit, published a fair report of proceedings in Parliament, which contained matter defamatory of an individual. The publication could not be said to be authorized by Parliament except in so far as the

<sup>1</sup> 9 A. & E. 1.

exclusion of reporters at the will of the House might have made such a report impossible. It was held by the Court of Queen's Bench, that such publications were lawful, and that while 'honestly and faithfully carried on, those who publish them will be free from legal responsibility, though the character of individuals may incidentally be injuriously affected.'

But such publication is carefully distinguished from the publishing of his speech by an individual. 'There is obviously,' says Cockburn C.J., 'a very material difference between the publication of a speech made in Parliament for the express purpose of attacking the conduct of an individual, *and afterwards published with a like purpose or effect*, and the faithful publication of Parliamentary reports in their entirety, with a view to afford information to the public, and with a total absence of hostile intention or malicious motive towards any one<sup>1</sup>.'

### § 3. *Privileges of the House not demanded by the Speaker.*

So far I have dealt with those privileges of the House which are demanded by the Speaker and granted by the Crown at the commencement of each Parliament. But there are other privileges which would seem to be considered inherent in the House, which are at any rate undoubtedly exercised by it, though they are not specifically claimed from the Crown.

#### (a) *Right to provide for its proper Constitution.*

One of these privileges is the right to provide for the proper constitution of the body of which it consists, by the issue of writs when vacancies occur during the existence of a Parliament; by enforcing disqualifications for sitting in Parliament; and, until 1868, by determining disputed elections.

(1) When a vacancy occurs in the House from any cause which legally vacates a seat, or when a member is returned

Filling of  
vacancies.

<sup>1</sup> *Wason v. Walter*, L. R. 4 Q. B. p. 85.



for two places and makes election which he will serve for, a warrant is issued by the Speaker, in pursuance of an order of the House, to the clerk of the Crown in Chancery, or, in the case of a seat in Ireland, to the clerk of the Crown in Ireland, for the issue of a writ for the return of a member to supply the vacancy. If the House is not sitting no authority could be given for the issue of the warrant, but this inconvenience is met, in nearly every case in which it could occur, by a series of Statutes which require the Speaker to issue his warrant, subject to certain restrictions, if a member should vacate his seat during the recess, by death, by elevation to the peerage, by bankruptcy, or by the acceptance of office, excepting always those formal offices which members take in order to effect a resignation of their seats in Parliament<sup>1</sup>.

Trial of  
disputed  
returns.

(2) The right to determine questions of disputed returns, claimed and exercised by the Commons from 1604 to 1868, was assigned by the Parliamentary Elections Act<sup>2</sup> of that year to a judge of one of the superior Courts of Common Law, it is now exercised by the King's Bench Division of the High Court. The claim of the House to jurisdiction in this matter was always doubtful, though exercised without question after 1604. Originally the writ addressed to the sheriff was returnable to Parliament: an Act of the 7th Henry IV provided that it should be returned to Chancery; if the return was disputed the matter was decided by the King, assisted by the Lords, though an Act of 1410 gave jurisdiction in the matter to the Judges of Assize<sup>3</sup>.

In the reign of Elizabeth the Commons claimed the right; in 1604 they insisted upon it. The case arose upon a disputed return for the county of Bucks, and the proceed-

<sup>1</sup> The Statutes are—as to death or peerage, 24 Geo. III, c. 26; as to office, 21 & 22 Vict. c. 110; as to bankruptcy, 46 & 47 Vict. c. 52, s. 33; as to certain formalities, 26 Vict. c. 20. The formal offices excepted are the Stewardships of the Chiltern Hundreds, of East Hendred, Hempholme, Northstead, or the escheatorship of Munster. Of these the first and fourth alone survive (*supra*, p. 95).

<sup>2</sup> 31 & 32 Vict. c. 125.

<sup>3</sup> Stubbs, Const. Hist. iii. 423.

ings are worth noting<sup>1</sup>. James I, in the proclamation for calling his first Parliament, took upon himself to admonish all persons concerned with the election of knights of shires, that, among other things, they should take express care that no bankrupt or outlaw was elected; he further announced that all returns should be made to the Chancery, and that if such returns were contrary to the tenor of his proclamation, they 'should be rejected as unlawful and insufficient.'

Fortescue  
and  
Goodwin.

Sir Francis Goodwin, an outlaw, was returned for the county of Bucks. On the return of his election being made, it was refused by the clerk of the Crown on the ground of the outlawry. The clerk issued a new writ on his own authority, and Sir John Fortescue was returned.

The House inquired into the matter, and having examined the clerk of the Crown, resolved that Goodwin was duly elected, and ordered the indenture of his return to be filed in the Crown office.

The Lords first took the matter up, and asked an explanation of the Commons; the Commons refused to discuss the question. A message then came from the Lords that the King desired the two Houses to confer upon the election. The Commons thereupon demanded access to the King, and stated the grounds of their action. The King asserted that returns 'being all made into the Chancery are to be corrected and reformed by that Court only into which they are returned,' and he desired the House to hold a conference with the Judges. This, after a long debate, the House determined not to do, but submitted an argumentative memorial to the King, meeting his objections and alleging precedents for the right they claimed. It is noticeable, that of the five precedents set forth, two only are cases of disputed returns, two are cases of disqualified persons being returned, and one a case of a member being returned for two places.

The King was not satisfied with the answer of the House; he still desired a conference between the Commons and the Judges. To this the Commons reluctantly assented; a con-

<sup>1</sup> Parliamentary History, vol. i, p. 998 et seq.

ference took place before the King and council, and the King in the end admitted the right of the House to be a court of record and judge of returns, though he claimed a corresponding jurisdiction for the Chancery; and he suggested as a compromise, that the elections of Fortescue and of Goodwin should both be held void and a new writ issued. This was done, and the right of the Commons was not afterwards questioned nor that of the Chancery asserted<sup>1</sup>.

Modes of  
trial.

For some time disputed returns were decided by a Committee of Privileges and Elections nominated by the House. This became an open committee of the whole House after 1672, and finally, in the time of Speaker Onslow, the confidence felt in him caused the parties to these suits to ask a trial at the bar of the House.

1727-  
1761.

Trial at  
bar.

It would have been difficult to find a worse tribunal. As the trial was before the whole House, no single member felt any individual responsibility. The tribunal was a large and fluctuating body, wanting alike in the training and the inclination to act judicially. In fact, a disputed return was settled by a party division. The closing struggles of Walpole's ministry in December, 1741, turned, not on his foreign or domestic policy, but on votes of the House taken on election petitions. 'Last Friday,' says Horace Walpole, 'we carried a Cornish election . . . You can't imagine the zeal of the young men on both sides.' 'Tuesday, we went on the merits of the Westminster election, and at ten at night divided and lost it. They had 220, we 216; so the election was declared void. We had forty-one more members in town who would not, or could not, come down. *The time is a touchstone for wavering consciences.* All the arts, money, promises and threats, all the arts of the former year are applied, and self-interest operates to the aid of their party and the defeat of ours<sup>2</sup>.' The merits of the disputed

<sup>1</sup> It is proper to note here a distinction between the claim of the Chancery, in the case of Fortescue and Goodwin, to adjudicate upon a disputed return, and the claim of the Chancellor, Lord Shaftesbury, in 1672, to issue writs to supply vacancies during a recess without a warrant from the Speaker.

<sup>2</sup> Letters of Horace Walpole (ed. Toynbee), i. pp. 144, 147.

election troubled no one: the trial to conscience was the question of deserting a minister whose fall was clearly imminent. Finally, the loss of the Chippenham election petition determined Walpole to resign.

Some improvement was effected when Mr. Grenville, in 1770, introduced and carried the Act known as the Grenville Act<sup>1</sup>, at first a temporary measure, but afterwards made permanent. This Act transferred the decision of disputed returns from the House to a committee, selected from a list chosen by lot, of forty-nine members, from which list the petitioner and sitting member struck out names alternately until the number was reduced to thirteen. Each party nominated an additional member, and the case was tried by this tribunal, to which was given the power of administering an oath. No appeal lay to the House, whose privileges in this respect were henceforth limited by the operation of the Statute. The committee was a more responsible tribunal than the House at large; it had a better chance of arriving at an impartial decision, and the power of administering an oath enabled it to obtain evidence on which it might rely: but its members could not fail to be interested on party grounds in the result of their decision, and being selected by lot, they had not necessarily any trained judicial capacity.

Acts of 1841<sup>2</sup> and 1848<sup>3</sup> reduced the number of the committee and made some changes in the mode of its appointment, but it was not until 1868 that the House adopted the only course by which a really satisfactory decision of controverted elections could be attained, and handed them over to the Courts of Law. The rules for their trial are now to be found in the Parliamentary Elections Act, 31 & 32 Vict. c. 125, and the amending Act, 42 & 43 Vict. c. 75. The petition is presented, not to the House but to the High Court of Justice; the trial is conducted, not by a committee of the House at Westminster, but by two Judges of the High Court in the borough or county of which the representation is in issue. The Judge

<sup>1</sup> 10 Geo. III, c. 16.

<sup>2</sup> 11 & 12 Vict. c. 98.

<sup>3</sup> 4 & 5 Vict. c. 58.

certifies his decision to the Speaker, and the House, on being informed of the certificate by the Speaker, is required (sect. 13) to enter the same upon the Journals, and to give such directions for confirming or altering the return, or for the issue of a new writ, as the form of certificate may necessitate.

Notice of  
disqualifi-  
cation.

(3) The House has given over to the Law Courts the right to determine controverted elections; that is to say, elections which are called in question on the ground that a candidate, otherwise properly qualified for a seat, has been returned in an informal manner, or by persons who were not entitled to vote, or by votes procured through improper inducements. But it retains the right to pronounce at once on the existence of legal disqualifications in those returned to Parliament, and will declare a seat to be vacant, if the member returned is subject to such disqualification, without waiting for the return to be questioned by persons interested in the matter. The case of O'Donovan Rossa, February 10, 1870, of John Mitchel, February 18, 1875, of Michael Davitt, February 28, 1882, of A. A. Lynch, March 2, 1903<sup>1</sup>, are instances of the exercise of this right by the House of Commons.

The case of John Mitchel, who was twice elected, illustrates best the action of the House in such matters. In the first instance, no petition was lodged, and the House declared the seat vacant. On the occasion of his second election, a petition was lodged, and the seat claimed by the other candidate: the House allowed the disqualification to be determined by the Courts; but it does not follow that the House was bound to await the decision of a Court of Law.

*Supra*,  
p. 87.

Unfitness  
to serve, a  
cause of  
expulsion.

(4) Cases may arise in which a member of the House, without having incurred any disqualification recognized by law, has so conducted himself as to be an unfit member of a legislative assembly. For instance, conviction for misdemeanour is not a disqualification by law though it may be a disqualification in fact, and the House of Commons is

<sup>1</sup> For these cases, see *May, Parl. Practice* (ed. 11), pp. 656-8.

then compelled to rid itself of such a member by the process of expulsion. But expulsion, although it vacates the seat of the expelled member, does not create a disqualification; and if the constituency does not agree with the House as to the unfitness of the member expelled, they can re-elect him. If the House and the constituency differ irreconcilably as to the fitness of the person expelled, expulsion and re-election might alternate throughout the continuance of a Parliament.

Effect of  
expul-  
sion.

In 1769 the House, irritated by the re-election of Wilkes whom it had expelled, proceeded not merely to expel him again but to declare his election void. The House thus endeavoured to create a new disability depending on its own opinion of the unfitness of Wilkes to be a member of its body. Being at that time a judge of returns the House was able to give effect to its decision, and in February 1770 to declare a subsequent re-election of Wilkes to be void, the votes recorded in his favour to be thrown away, and the candidate next on the poll to be duly returned<sup>1</sup>.

But the arbitrary conduct of this House of Commons was not imitated by its successors. Wilkes was elected to serve in the new Parliament of 1774 and took his seat without question.

In 1782 a resolution which he had moved in five previous years was carried, and the vote which declared his election void, and all the declarations, orders and resolutions respecting the Middlesex election<sup>2</sup>, were expunged from the Journals of the House.

It may be useful to set out the manner of proceeding where a member has been convicted of misdemeanour and has thereby incurred the penalty of expulsion.

The judge who presides at the trial and gives sentence, communicates the fact to the Speaker, and the Speaker informs the House of what has occurred.

Process of  
expul-  
sion.

<sup>1</sup> A similar line of action was adopted by the House in 1712, when Walpole was expelled the House, and re-elected by his constituents. The election was declared to be void, and no further question was raised. Cobbett, *Parl. Hist.* vi. 1071.

<sup>2</sup> May, *Const. History of England*, i. 414, where a full account of the Wilkes controversy is to be found.

A motion is then made that a humble address be presented to the King to give directions that a copy of the Record of the proceedings at the trial be laid before the House. This being done, on a subsequent day the House is moved:—

That the letter addressed to Mr. Speaker, by Mr. Justice — respecting the conviction before the Central Criminal Court of A. B. member for — might be read, and the same was read as follows :

Mr. Speaker,

I beg to inform you that A. B. M.P. was this day convicted of a misdemeanour for which I have sentenced him to twelve calendar months' imprisonment.

And I have the honour to remain, &c. &c.

A motion is then made and the question put, that the said letter and record of the proceedings upon the trial of A. B. be now taken into consideration.

If it is resolved in the affirmative the House accordingly proceeds to take the letter into consideration, and if the result is unfavourable to A. B. it is resolved that A. B. be expelled the House<sup>1</sup>.

(b) *Right to the exclusive cognizance of matters arising within the House.*

Blackstone lays it down as a maxim upon which the whole law and custom of Parliament is based, 'that whatever matter arises concerning either House of Parliament ought to be examined, discussed, and adjudged in that House to which it relates, and not elsewhere.'

Limits of  
the right.

This statement cannot be accepted without certain reservations. It is not true to say that because a matter has arisen *concerning* the House, and has been adjudged within the House, such a matter cannot be considered elsewhere, if it affects rights exercisable outside and independently of the House. It is strictly true to say that the House has the exclusive right 'to regulate its own internal concerns,'

Extent of  
the right.

<sup>1</sup> The cases which have furnished ground for expulsion are summarized in May, *Parl. Practice* (ed. 11), p. 56.

and that, short of a criminal offence committed within the House or by its order, no Court would take cognizance of that which passes within its walls.

The most recent illustration of this statement is the case of *Bradlaugh v. Gosset*<sup>1</sup>. Mr. Bradlaugh complained that having been elected and returned member for the borough of Northampton, he had not been allowed to take the oath required by the Parliamentary Oaths Act<sup>2</sup>, and that, by a resolution of the House, the Serjeant-at-Arms had been ordered 'to exclude Mr. Bradlaugh from the House until he shall engage no further to disturb the proceedings of the House.' The disturbance in question arose from the attempt of Mr. Bradlaugh to take the oath which the law required him to take, and which a resolution of the House prevented him from taking. He asked the Court to declare the order of the House to be void, and to restrain the Serjeant-at-Arms from carrying it into effect.

Case of  
Mr. Brad-  
laugh.

The Court held that it was not concerned with the interpretation which the House of Commons, for the regulation of its internal procedure, chose to place upon a statute; and that the House, having power of exclusion, had power to effect such exclusion by the necessary force. The law on the subject is very clearly set forth in the judgment of Stephen J.<sup>3</sup>

The House  
can inter-  
pret rules  
for its own  
procedure.

'In order to raise the question now before us, it is necessary to assume that the House of Commons has come to a Resolution inconsistent with the Act; for, if the Resolution and the Act are not inconsistent, the plaintiff has obviously no grievance. We must of course face this supposition, and give our decision upon the hypothesis of its truth. But it would be indecent and improper to make the further supposition that the House of Commons deliberately and intentionally defies and breaks the Statute-law. The more decent, and I may add the more natural and probable supposition is, that, for reasons which are not before us, and of which we are therefore unable to judge, the House of Commons considers that there is no inconsistency between the Act and the

<sup>1</sup> 12 Q. B. D. 271.

<sup>2</sup> 29 & 30 Vict. c. 19.

<sup>3</sup> *Bradlaugh v. Gosset*, 12 Q. B. D. 280.



Resolution. They may think there is some implied exception to the Act. They may think that what the plaintiff proposes to do is not in compliance with its directions. With this we have nothing to do. Whatever may be the reasons of the House of Commons for their conduct it would be impossible for us to do justice without hearing and considering those reasons; but it would be equally impossible for the House, with any regard for its own dignity and independence, to suffer its reasons to be laid before us for that purpose, or to accept our interpretation of the law in preference to its own. It seems to follow that the House of Commons has the exclusive power of interpreting the statute, *so far as the regulation of its own proceedings within its own walls is concerned*; and that, even if that interpretation should be erroneous, this Court has no power to interfere with it directly or indirectly.'

The Courts accept that interpretation.

They take no cognizance of things done within the House,

The point at which Courts of Law will enter upon a discussion as to the limits of privilege and the effect of resolutions of the House outside its walls is a matter for separate consideration. But the Judges, in the case referred to, state as clearly as it is possible to state a legal proposition, that they would take cognizance of nothing 'which was done within the walls of the House' short of a criminal offence.

except in case of crime.

It should be noted that the Courts have more than once intimated that a crime committed in the House or by its order would not thereby be considered outside their jurisdiction.

*Supra*,  
p. 159.

In the case of Sir John Eliot and others above referred to, who were convicted of seditious speeches in Parliament *and of an assault upon the Speaker*, the House of Lords, reversing the judgment upon error, does so on the ground that two distinct offences were included in one judgment, and that one of these offences, the alleged seditious speeches, was not cognizable by the Court of King's Bench. But it was not thereby decided that an assault upon a member of the House, committed within its walls, might not be dealt with in a Court of Law; and Lord Ellenborough, in *Burdett v. Abbott*, guards himself by saying that it will be time to consider such a case when it arises<sup>1</sup>.

<sup>1</sup> 14 East, at p. 128.

And lastly, Mr. Justice Stephen says 'that he knows of no authority for the proposition that an ordinary crime committed in the House of Commons would be withdrawn from the ordinary course of criminal justice<sup>1</sup>.'

(c) *Power of inflicting punishment for breach of Privilege.*

The House is invested, as we have seen, with the exclusive power of regulating its own procedure and adjudging matters which arise within its walls. It follows that the House must possess some power of enforcing its privileges in this respect, and of punishing those who infringe them.

The offences for which punishment is inflicted may be generally described as disrespect to any member of the House, as such, by a person not being a member : disrespect to the House collectively, whether committed by a member<sup>2</sup> or any other ; disobedience to orders of the House, or interference with its procedure, with its officers in the execution of their duty, or with witnesses in respect of evidence given before the House or a Committee of the House.

The mildest form of punishment is by summons to the bar of the House, followed by an *admonition* addressed to the offender by the Speaker. The person so summoned may purge himself of his contempt by an apology accepted by the House in full satisfaction of his offence, and so may escape being admonished.

A more serious mark of the displeasure of the House is *Reprimand*, addressed to the offender by the Speaker. This however is almost invariably preceded by commitment<sup>3</sup>.

Commitment is in the first instance to the custody of the Serjeant-at-Arms, an officer whose appointment and duties I have described already.

Before dealing with the right to commit to custody, or

<sup>1</sup> 12 Q. B. D. 283.

<sup>2</sup> The suspension of members from the service of the House after being named by the Speaker would seem to fall more properly under the rules for conducting debate (s. iv/a, ch. vii. Sect. ii. § 1).

<sup>3</sup> For the exceptions see May, Parl. Practice (ed. 11), 92.

to prison, I will note two other forms of punishment used by the House.

**Fine.**

In former times the House of Commons has imposed fines for breaches of privilege, but the practice has long been discontinued, except in so far as the payment of fees as a condition precedent to release from imprisonment partakes of the nature of a fine<sup>1</sup>.

**Expulsion.**

In the case of its own members, the House has a stronger mode of expressing its displeasure. It can by resolution expel a member, and order the Speaker to issue his warrant for a new writ for the seat from which the member has been expelled. But it cannot prevent the re-election of such a member by declaring him incapable of sitting in that Parliament. In attempting to do this, in the case of Wilkes, the House had ultimately to admit that it could not create a disqualification unrecognized by law<sup>2</sup>.

But expulsion is a matter which concerns the House itself and its composition, and amounts to no more than an expression of opinion that the person expelled is unfit to be a member of the House of Commons. The imposition of a fine would be an idle process unless backed by the power of commitment. It is, then, the right of commitment which becomes, in the words of Sir E. May, 'the keystone of Parliamentary privilege.' It remains to consider how it is exercised and by what right.

When a person is committed to the custody of the Sergeant-at-Arms, he may purge himself of his contempt by an apology, or he may be let off with a reprimand, or he may be committed to prison; or, in the case of a flagrant contempt, the person guilty may be committed to prison without being previously brought into the

<sup>1</sup> May, *Parl. Practice* (ed. 11), 92. No fine has been imposed since 1666: but on April 7, 1892, there was some discussion as to inflicting a fine upon directors of a railway company for dismissing a servant of the company on account of evidence given before a Committee of the House. A considerable minority of the House seemed anxious to vote for forms of punishment which the House had no machinery for enforcing.

<sup>2</sup> *Parl. Hist.* xxii. 1407, and *vide supra*, p. 173.

presence of the House or given an opportunity of apologizing.

But the power of the House to punish in this manner is limited by the duration of the Session; prorogation releases prisoners committed by its order, whether or no they have paid their fees. The House cannot therefore imprison for any fixed term; if it did so, and a prorogation occurred before the conclusion of the term, the prisoner would be entitled to a discharge upon a writ of *habeas corpus*. The limit of imprisonment.

The origin of this power of commitment for contempt has been variously stated.

It has been claimed for the House as a right inherent in every Court of Record; but there is much discussion as to whether the House is or is not a Court of Record. Grounds of right to commit.

In the case of Fortescue and Goodwin the House vehemently contended that it was a Court of Record: so too in the debate on Floyd's case, where Coke's words are summarized: 'No question but this is a House of Record, and hath power of judicature in some cases. Have power to judge of Returns and Members of our House'. That the House is a Court of Record.

But if the House rests its claim on this ground, the claim has been abandoned with the abandonment of the right to determine controverted elections. It might be said that the Journals of the House are records, and this also was maintained by Lord Coke. He rested his arguments on the words of the Act of Henry VIII, which requires licence or leave of absence given to a member 'to be entered of Record in the book of the Clerk of the House.' But it is doubtful whether the word 'record' is there used in a technical sense. 6 Hen. VIII, c. 16.

The Journals of the House<sup>1</sup>, which are prepared by the clerks of the House from entries of the proceedings made by him daily, perused by the Speaker, and then printed for the use of members, are expressly declared by Lord

<sup>1</sup> 1 Com. Jour. 604.

<sup>2</sup> The Rotuli Parliamentorum record the proceedings of Parliament from 1278 to 1503. The Lords' Journals commence in 1509: the Commons' Journals in 1547.

Mansfield *not* to be matter of record<sup>1</sup>. The *dictum* was not necessary for the purpose of the decision, but may fairly be set off against the statements of Coke, of which one is made in debate, the other in the posthumous volume of the Institutes.

14 East,  
152.  
That the  
right is  
needed to  
maintain  
its  
dignity.

It is noticeable that in the case of *Burdett v. Abbott*, while Bayley J. rests the claim of the House to commit on its parity of position with Courts of Judicature, Lord Ellenborough C. J. rests his decision on the broader ground of expediency, and the necessity of such a power for the maintenance of the dignity of the House.

‘If there were no precedents upon the subject, no legislative recognition, no practice or opinions in the Courts of Law recognizing such an authority, it would still be essentially necessary to the Houses of Parliament to have it; indeed, they would sink into utter contempt and inefficiency without it. Could it be expected that they should stand high in the estimation and reverence of the people, if, whenever they were insulted, they were obliged to await the comparatively slow proceedings of the ordinary Courts of Law for their redress? that the Speaker, with his mace, should be under the necessity of going before a grand jury to prefer a bill of indictment for the insult offered to the House? They certainly must have the power of self-vindication in their hands: and if there be any authority in the recorded precedents of Parliament, any force in the recognition of the Legislature, and in the decisions of the Courts of Law, they have such a power.’

14 East,  
152.

On the whole, it would seem that the right of committal finds a surer basis on the necessity of such a power for the maintenance of the dignity of the House, than on any technicality as to the House being a Court of Record<sup>2</sup>.

<sup>1</sup> *Jones v. Randall*, 1 Cowp. 17.

<sup>2</sup> The limited sense in which the term ‘Court of Record’ would probably be construed may be illustrated from the case of a Colonial Legislature (the House of Assembly of Nova Scotia), which enacted that it was a Court of Record, and on the strength of this enactment punished a contempt of its privilege by imprisonment. The right of the Assembly to do this was upheld by the Judicial Committee. The powers taken to itself by this House were construed to be ‘the powers of a Court of Record for the

§ 4. *Limitation of Privilege by Courts of Law.*

The Privileges of Parliament, like the Prerogative of the Crown, are rights conferred by Law, and as such their limits are ascertainable and determinable, like the limits of other rights, by the Courts of Law. They consist, in fact, of rights acquired by custom or conferred by Statute, belonging to the House collectively, or to its members as individuals, and having for their object the freedom, the security, or the dignity of the House of Commons. Cases have arisen in which the House has set up claims which the Courts have been compelled to consider.

*Causes of conflict between House and Courts.*

1. The House has asserted that it is the sole judge of the extent of its privileges. The practical result of this assertion is that the House has declared certain acts, legal in themselves, to be breaches of privileges, or certain acts, unlawful in themselves, to be legalized by its declaration of privilege.

*Claim of House to determine its privilege.*

To this the Courts have made reply, that when privilege conflicts with rights which they have it in charge to maintain, they will consider whether the alleged privilege is authentic, and whether it governs the case before them.

From the mass of learning and argument lavished upon this topic, it will be enough to select three cases and to state shortly their results as illustrating the law.

In *Ashby v. White* an action was brought by an elector for the borough of Aylesbury against a returning officer who had refused to allow him to give a vote to which he was legally entitled.

*Ashby v. White.*

The right to vote was not in question, only the right to sue for the refusal to allow the voter the exercise of his legal right.

The Commons resolved that 'neither the qualification

purpose of dealing with breaches of privilege and contempt by way of committal,' but not to 'try or punish criminal offences otherwise than as incident to the protection of members in their proceedings.' *Fielding v. Thomas* (1896), App. Ca. 612.

of any elector, nor the right of any person elected, is cognizable or determinable elsewhere than before the Commons of England in Parliament assembled'; and they further resolved that Ashby was guilty of a breach of privilege in bringing his action into a Common Law Court.

The confusion of ideas which brought about this resolution was curious.

The House of Commons had, beyond doubt, the right to determine the validity of an election. If the House determined that an election was invalid because persons had voted who were not qualified to vote, persons possessing the alleged qualification would thenceforward be disentitled to vote.

The Court of Queen's Bench had, equally beyond doubt, the right to try an action for withholding a Common Law right, such as the franchise, from a man entitled to it. The Court could not determine, and did not profess to determine, any matter which would affect the validity of an election. It must needs inquire into the right of the plaintiff to give a vote, in order to ascertain if the plaintiff had a cause of action.

The House of Commons could have given the plaintiff no remedy; he could only have obtained its decision on his right to vote, by calling in question the validity of the election. As the candidate for whom he would have voted was elected, he had no inducement to do this; and, if he had done so, the only redress which he might have thereby obtained would have been the committal of the returning officer for contempt. 'Was ever such a petition heard of in Parliament,' said Holt C. J., 'as that a man was hindered of his vote, and praying them to give him a remedy? The Parliament would undoubtedly say, Take your remedy at law. It is not like the case of determining the right of election between the candidates<sup>1</sup>.'

The majority of the Court differed from Holt and held that there was no right of action; on writ of error this judgment was reversed in the House of Lords; there

<sup>1</sup> 1 Sm. L. C. (ed. 11) 263.

ensued a long altercation between the two Houses, into the details of which it is unnecessary to enter, and the matter was ended by a prorogation.

In *Stockdale v. Hansard* the House ordered the publication of matter defamatory of the plaintiff; the defendant set up two defences, that the statements complained of were true, and that, if they were not, the order of the House privileged the publication. *Stockdale v. Hansard.*

Lord Denman, in trying the case, told the jury that he was 'not aware of the existence in this country of any body whatever that can privilege any servant of theirs to publish libels of any individual.' The jury found for the defendants that the statements alleged to be defamatory were true. But the Commons took offence at the manner in which Lord Denman had dealt with the question of privilege, and passed resolutions, the effect of which has thus been summarized by an eminent authority<sup>1</sup>. *Lord Denman's ruling.*

'(1) That the order of the House of Commons affords a justification for the sale of any papers whatever which they may think fit to circulate. *Resolutions of House.*

'(2) That no Court of Justice has jurisdiction to discuss or decide any question of Parliamentary privilege which arises before it, directly or incidentally.

'(3) That the vote of the House of Commons declaring its privilege is binding upon all Courts of Justice in which the question may arise.'

Other actions were brought by Stockdale against the Messrs. Hansard, and the House resolved that its printers should plead to the action, but in such a way as to rest their defence on the ground of privilege only. On demurrer to this plea, the Court of Queen's Bench supported Lord Denman's statement of the law. *Judgment on demurrer.*

The points for determination were clearly set forth in the judgment of Patteson J.

'First: Whether an action at law will lie in any case for any act whatever admitted to have been done by the order and authority of the House of Commons. *Judgment of Patteson J.*

<sup>1</sup> Mr. Pemberton, afterwards Lord Kingsdown, in his 'Letter to Lord Langdale on the recent proceedings in the House of Commons on the subject of Privilege,' p. 17.



'Secondly : Whether a resolution of the House of Commons, declaring that it had power to do the act complained of, precludes this Court from inquiring into the legality of that act.

'Thirdly : If such resolution does not preclude the Court from inquiring, then whether the act complained of be legal or not.'

Order of  
House no  
defence to  
illegal act.

On the first point the learned judge had no difficulty in holding that, though no action could lie against a member of the House for things done in the House, yet that if the thing done was to make an illegal order, the privileges of the House would not shelter those who carried that illegal order into effect outside the House. Nor had he any hesitation in holding that, if the second question were answered in the negative, the act complained of was illegal.

Resolu-  
tion of  
House no  
bar to  
inquiry  
by Court.

The bulk of his argument was addressed to the question whether the resolution of the House was a bar to inquiry by a Court of Law into the legality of the acts which it had ordered : in other words, Could the House prohibit the Courts, by resolution, from discussing the legality of any act which it might choose to command ?

'Upon the whole, the true doctrine appears to me to be this : that every Court in which an action is brought upon a subject matter generally and *prima facie* within its jurisdiction, and in which, by the course of the proceedings in that action, the powers and privileges and jurisdiction of another Court come into question, must of necessity determine as to the extent of those powers, privileges, and jurisdiction : that the decisions of that Court, whose powers, privileges, and jurisdiction are so brought into question, as to their extent, are authorities ; and, if I may so say, evidences in law upon the subject, but not conclusive. In the present case, therefore, both upon principle and authority, I conceive that this Court is not precluded by the resolution of the House of Commons of May, 1837, from inquiring into the legality of the act complained of, although we are bound to treat that resolution with all possible respect, and not by any means to come to a decision contrary to that resolution, unless we find

ourselves compelled to do so by the law of the land, gathered from the principles of the common law, so far as they are applicable to the case, and from the authority of decided cases, and the judgments of our predecessors, if any be found, which bear upon the question<sup>1</sup>.

The learned judge dwelt on the importance of maintaining all such privileges as are necessary for the protection of the House of Commons, but he distinguished the maintenance of these privileges from the assertion of 'the power of invading the rights of others.' The onus of showing the existence and legality of the power claimed lay upon the defendants, and he held that in this they had failed.

The view entertained by the Court as to the nature of True privilege is clear. It is a defensive and not an aggressive nature of weapon lodged with the House, and, in order to justify its privilege. use for the purpose of legalizing a libel, more ample authority was required than the Attorney-General was able to produce.

The character of the difficulties which arose between the House and the Courts is identical in each of these cases. Grounds of contention.

In *Ashby v. White*, the Commons thought that if the Court of Queen's Bench tried an action brought by an elector against a returning officer for refusing to allow him to vote, their right to determine disputed returns was being infringed.

In *Stockdale v. Hansard*, they thought that if the same Court tried an action for libellous matter contained in a report made to them pursuant to a Statute, and published by their order, their right to the regulation of their own proceedings was being infringed.

In each case, when the House became aware that the application of its privilege to the matter in hand conflicted with rules of law, it seems in an impulse of annoyance to have asserted a right to define its own privileges in such terms as to override rules of law.

In *Ashby v. White*, the House found itself in conflict with the jurisdiction in error of the House of Lords, and a proro-

<sup>1</sup> *Stockdale v. Hansard* 9 A. & E. 203.

gation alone could avert the collision of the two Houses. In *Stockdale v. Hansard*, the House found it prudent to concur in the passing of an Act, by which publications ordered by Parliament were protected from the law relating to defamation.

**Bradlaugh v. Gosset.** It remains to consider a case in which there was no such conflict of jurisdictions as in the two to which I have just referred.

A resolution of the House of Commons, relating to matters confined within the walls of the House, was called in question, in *Bradlaugh v. Gosset*<sup>1</sup>, and the issue raised was, on this occasion, free from all circumstances of irritation. It was stated with the utmost clearness by Stephen J.: 'Suppose that the House of Commons forbids one of its members to do that which an Act of Parliament requires him to do, and, in order to enforce its prohibition, directs its executive officer to exclude him from the House, by force if necessary—is such an order one which we can declare to be void, and restrain the executive officer of the House from carrying out?'

The distinction between the cases in which Courts of Law consider that the House is alone interested in the matter in hand and those in which rights external to the House are involved is very clearly furnished by the circumstances of the case; and in the judgment of Stephen J.

**Relation of Courts to Privilege.**

'A resolution of the House, permitting Mr. Bradlaugh to take his seat on making a statutory declaration, would certainly never have been interfered with by this Court. If we had been moved to declare it void and to restrain Mr. Bradlaugh from taking his seat until he had taken the oath, we should undoubtedly have refused to do so. On the other hand, if the House had resolved ever so decidedly that Mr. Bradlaugh was entitled to make the statutory declaration instead of taking the oath, *and had attempted by resolution or otherwise to protect him against an action for penalties*, it would have been our duty to disregard such a resolution, and, if an action for penalties were brought, to hear and determine it according to our own interpretation of the Statute . . . We

<sup>1</sup> 12 Q. B. D. 281.

should have said that, for the purpose of determining a right to be exercised within the House itself, and in particular the right of sitting and voting, the House, and the House only, could interpret the Statute; *but that as regarded rights to be exercised out of and independently of the House, such as the right of suing for a penalty for having sat and voted, the Statute must be interpreted by this Court, independently of the House.*'

On the whole, it seems now to be clearly settled that the Courts will not be deterred from upholding private rights by the fact that questions of parliamentary privilege are involved in their maintenance; and that, except as regards the internal regulation of its proceedings by the House, Courts of Law will not hesitate to inquire into alleged privilege, as they would into local custom, and determine its extent and application.

2. But there is another point on which Courts of Law <sup>Need</sup> have come into contact with the House of Commons. <sup>grounds of</sup> It relates to the right of committal for contempt. <sup>commit-</sup> The ques- <sup>ment ap-</sup> tion is shortly this: whether, if a person, so committed, <sup>pear</sup> obtains a writ of *habeas corpus*, it is a sufficient return to the writ that the committal was by a warrant, issued in pursuance of an order of the House of Commons, when the warrant for committal did not specify any other grounds than contempt. In *Paty's*<sup>1</sup> case, in 1705, the Court of Queen's Bench held that it was sufficient return to a writ of *habeas corpus* that the prisoner was committed for contempt, although the contempt alleged was that Paty, one of those aggrieved by the conduct of the returning officers for Aylesbury, had brought an action against them, as in *Ashby's* case the Court had already held that he was entitled to do. Holt C. J. dissented from this judgment and, though he was in a minority, I shall state hereafter some reasons for thinking that his view was the correct one.

In *Murray's*<sup>2</sup> case (1751), the return to the writ alleged contempt simply, and the King's Bench held that 'it need not appear what the contempt was, for if it did appear we could not judge thereof.' Like law is laid down by Lord

<sup>1</sup> 2 Lord Raymond, 1105.

<sup>2</sup> 2 Wils. 299.

Ellenborough in the case of *Burdett v. Abbott*<sup>1</sup>, and in the case of the *Sheriff of Middlesex*<sup>2</sup>; and the matter is put most clearly in the question laid before the judges by Lord Eldon, when *Burdett v. Abbott*<sup>3</sup> came before the House of Lords for decision. He asked them whether, if the Court of Common Pleas had committed for contempt, stating no other cause on the warrant, or the circumstances of the contempt, and the matter came before the Court of King's Bench on the return to a writ of *habeas corpus*, the latter Court 'would discharge the prisoner, because the particular facts and circumstances out of which the contempt arose were not set forth in the warrant.' The judges unanimously answered that it would not do so, and the House of Lords thereupon decided for the defendant.

Cause of  
commit-  
ment need  
not ap-  
pear,

The case of *Burdett v. Abbott* did not arise, like the previous cases, upon a return to a writ of *habeas corpus*, but in an action of trespass brought against the Speaker for causing the plaintiff's house to be broken and entered, and himself to be carried to the Tower and kept there. But it is clear that, whether or no the House of Commons is a court of record, not only has it the same power of protecting itself from insult by commitment for contempt, but the Superior Courts of Law have dealt with it in this matter as they would with one another, and have accepted as conclusive its statement that a contempt has been committed, without asking what that contempt may have been.

but if it  
does the  
Courts  
will con-  
sider its  
adequacy.

If the alleged contempt be expressed in the warrant, it is possible that a Court of Law might consider the commitment on its merits. Thus, Lord Ellenborough, in *Burdett v. Abbott*, states the law :—

'If a commitment appeared to be for a contempt of the House of Commons generally, I would neither in the case of that Court<sup>4</sup>, nor of any other of the Superior Courts, inquire further; but if it did not profess to commit for contempt, but for some matter appearing on the return, which

<sup>1</sup> 14 East, 1.

<sup>2</sup> 11 Ad. & E. 809.

<sup>3</sup> 5 Dow. 199.

<sup>4</sup> It is noticeable that Lord Ellenborough uses the term 'Court' of the House of Commons. Probably the word must be understood in the limited sense in which it is used in *Fielding v. Thomas* (1896), App. Ca. 612.

could by no reasonable intendment be considered as a contempt of the Court committing, but a ground of commitment palpably arbitrary, unjust, and contrary to every principle of natural justice; I say that in case of such a commitment . . . we must look at it and act upon it as justice may require, *from whatever Court it may profess to have proceeded*<sup>1</sup>.

And thus it is possible that the opinion of Holt C. J. in Paty's case may have been the better one, and that if a contempt were alleged to consist in the exercise of a legal right, a Court of Law might 'act upon it as justice may require.'

Beyond this however the Courts are not likely to go in the examination of the Speaker's warrant. It is regarded in the light of a mandate which issues 'from a superior Court acting according to the course of the Common Law,' and differs in this respect from 'the warrants of magistrates or others acting by special statutory authority and out of the course of the Common Law.' Thus the warrant would be valid unless some obvious irregularity should appear upon the face of it<sup>2</sup>.

### *Payment of Members.*

It is not easy to find a place for this new addition to the rights of members of the House of Commons; by many it is not regarded in the light of a privilege. From the commencement of the financial year 1911-12, every member who is not in receipt of an official salary will receive £400 a year, paid quarterly, and subject to income tax: and this charge upon the taxpayer will come up every year as one of the votes in Supply.

These salaries differ from the wages which fell into disuse early in the seventeenth century: (1) the payment is made by the Exchequer and not by the constituency; and (2) there is no such condition as was imposed by 6 Hen. VIII, c. 16, that unless the member attend the House until the close of the Session wages should not be paid.

<sup>1</sup> *Burdett v. Abbott*, 14 East, 150.

<sup>2</sup> *Howard v. Gosset*, 10 Q. B. 359.

## CHAPTER V

### THE HOUSE OF LORDS

WE have, so far, dealt with that part of the legislature which is brought into existence by popular election taking place in pursuance of writs of summons issued by the Crown. We now come to deal with that part which depends for its existence on royal writs addressed to its individual members.

Peerage not identical with Lords of Parliament.

But we are apt to speak of the Lords of Parliament or of the House of Lords as though these were convertible terms with the Peerage, forgetting that the political functions and privileges of a peer who is also a Lord of Parliament are not summed up in his right to a place in an hereditary legislative body, and that the Peerage is not conterminous with the House of Lords.

Lords of Parliament who are not Peers.

That the Peerage and the House of Lords do not mean the same thing is easily shown. For it would seem to be of the essence of the Peerage that it should carry with it hereditary right<sup>1</sup>; such hereditary right is wanting not only to the Bishops but also to the Lords of Appeal, yet Bishops and Lords of Appeal are entitled to be summoned to the House of Lords.

Peers who are not Lords of Parliament.

Again, the peerage before the Union with Scotland was the peerage of the realm of England: after the Union it became the peerage of the kingdom of Great Britain<sup>2</sup>, but as many of the peers of Great Britain as were such in virtue of being peers of Scotland did not become Lords of Parliament unless they were in the number of the sixteen representative peers. After the Union with Ireland the peerage became that of the United Kingdom of Great Britain and Ireland, but again such as belonged to this body as peers of Ireland did not become Lords of Parlia-

<sup>1</sup> A peerage is, in law, an incorporeal hereditament, 'an inheritance'. Palmer, *Peerage Law in England*, p. 4, and see authorities there cited.

<sup>2</sup> 6 Anne, c. 11, Art. 23.

ment unless they were in the number of the twenty-eight representative peers<sup>1</sup>.

It follows therefore that there are Lords of Parliament who are not Peers, and Peers who are not Lords of Parliament. There are certain functions and attributes common to Peers who are Lords of Parliament and to Peers who are not. These may be distinguished in the Lords' Report on the dignity of a Peer, where peers are described:—*'First as possessing individually titles of honour giving them respectively rank and precedence; secondly, as being individually hereditary counsellors of the Crown; thirdly, as being collectively (together with the Spiritual Lords), when not assembled in Parliament, the permanent council of the Crown; fourthly, as being also collectively (together with the Spiritual Lords), when assembled in Parliament, a Court of Judicature; and fifthly, as having for a long time formed with the Commons, when convened in Parliament, the Legislative Assembly of the kingdom by whose advice, consent and authority, with the sanction of the Crown, all laws have been made'*.<sup>2</sup>

Functions  
of Peerage.

It would appear then that there are certain privileges and duties of peers which are distinct from those of a Lord of Parliament. Those which appertain to them as Counsellors of the Crown or as a Court of judicature are more properly dealt with elsewhere<sup>3</sup>. Others may be considered here; but first let us ask, of what persons does the House of Lords consist? Can we classify the Lords of Parliament?

There are five kinds of qualification for membership of the House of Lords, and the 'Lords Spiritual and Temporal' consist of—

Qualifica-  
tions for  
House of  
Lords.

- (1) Hereditary peers of the United Kingdom:
- (2) Hereditary peers who are not hereditary Lords of Parliament—
  - (a) The 16 representative peers of Scotland elected for each Parliament,

<sup>1</sup> 39 & 40 Geo. III, c. 67, Article iv.

<sup>2</sup> Lords' First Report on Dignity of a Peer, p. 14.

<sup>3</sup> Part ii, The Crown, vol. i, p. 136; vol. ii, p. 284.



- (b) The 28 representative peers of Ireland elected for life:
- (3) Lords who are Lords of Parliament during their lives but transmit no rights, whether as peers or as Lords of Parliament, to their heirs—
- (a) The 26 lords spiritual,
- (b) The lords of appeal.

Of these, the lords spiritual hold their place as Lords of Parliament, conditionally on the discharge of episcopal duties. A bishop who resigns his bishopric ceases to be a Lord of Parliament, though he retains rank and precedence<sup>1</sup>. The same rule applied to the Lords of Appeal and their discharge of judicial functions before 1887; but they now hold their place in Parliament for life<sup>2</sup>.

### § 1. *The Baronage as an estate of the realm.*

Origin of  
baronage.

Such is the present constitution of the House of Lords. But it is necessary to ask not only how these different kinds of qualification arose, but how the entire body of the House comes to exist as an independent branch of the legislature representing an estate of the realm.

Feudal-  
izing  
of great  
Council.

The Witan of the Saxon kings comprised, at any rate, the earls and bishops. The temporal office of the one, the spiritual office of the other, conferred a right to be present at the great council of the realm. After the Norman Conquest the earl lost, to a great extent, his official position. Nor did the bishop any longer hold his lands free of all but spiritual service. In the words of Dr. Stubbs, 'the earldoms became fiefs instead of magistracies, and even the bishops had to accept the status of barons<sup>3</sup>.' Attendance at the King's court became a liability rather than a right, a liability arising out of tenure. We can consider later whether the bishop is summoned in right of his spiritual office or on the liability of his temporal barony.

<sup>1</sup> 32 & 33 Vict. c. 111, s. 5.

<sup>2</sup> 50 & 51 Vict. c. 70, s. 2.

<sup>3</sup> Const. Hist. i. 270.

The earls created after the Conquest were few : nor was it the policy of the Norman and Angevin kings to retain the great territorial offices of the Anglo-Saxon kingdom. But when the baronage appears in the reign of Edward I, as an estate of the realm summoned in a special form to a deliberative assembly distinct from the Commons, it consisted of many persons besides earls and bishops, and we are met by the difficulty of ascertaining how this body was constituted and what were its distinctive characteristics.

When John promised that he would never exact any aid other than the three feudal aids unless with the assent of the common council of the realm, the persons who were described as entitled to be present at the council were the tenants in chief of the Crown. The assembly was divided into two groups, and of one group each member received a special summons. Some members of this group are easily distinguishable from all the members of the other: the archbishops, bishops, abbots and earls. Besides these come the '*majores barones*,' and where all alike depended for their right to be present on holding lands of the Crown, it is not easy to say what constituted the difference between the *majores barones* specially summoned and the *minores barones* and other tenants in chief summoned '*in generali*.' It may have been greater extent of possessions, or greater political influence, or a longer line of descent.

So far as the assembly of John is concerned its only importance to us lies in the conclusion to which it leads us, that, since the right to be present depended in all cases upon tenure, the distinction between the *majores barones* and the *minores barones* could not have rested on the fact that the former held of the Crown.

This conclusion is important when we ask what gave a right of summons to the assembly of the baronage in the constitution of Edward I. The right of representation in the House of Commons of 1295 most certainly did not depend upon the holding lands of the Crown. Did then the right of summons to the House of Lords depend upon such holding? Or I may put the question in this way: Apart from the earls and bishops, was the estate of the

Tenure *per*  
*baroniam*  
gave no  
right of  
summons.

baronage limited to such persons as held of the Crown on baronial tenure, and did such tenure confer a right to be summoned? There are in fact three possibilities as to the relation of the estate of the baronage to tenure. The King might have been bound to summon all who held of him '*per baroniam*,' and none other: he might have been free to select for summons whom he chose within the limits of those who held lands of him either *per baroniam* or on some other tenure; or his discretion as to the summons might have been unrestricted by the requirement of tenure.

We may dismiss the first of these three possibilities. There seems to be no doubt that the particular holding which carried with it the feudal obligations of a barony, the holding of thirteen knights' fees and a third, did not place the holder among the *majores barones*, nor did it confer the right to be summoned to Parliament. The Committee of the House of Lords appointed in 1819 to inquire into 'all matters touching the Dignity of a Peer of the Realm' came to a decided conclusion that many who were in possession of baronies in the technical sense of holding *per baroniam* were not summoned by Edward I<sup>1</sup>.

Was it a  
condition  
of sum-  
mons?

The second question, whether the discretion of the King as to summons was or was not limited to those who held of himself, *per baroniam* or otherwise, admits of some doubt.

The case of Thomas Furnival illustrates this point as to the character of the tenure. It was not necessary that the person summoned should hold as by barony. Thomas Furnival was amerced for lands held of the King, as by barony. He alleged that he did not hold his lands on such tenure. On inquisition made by order of the Exchequer it was found that he held the lands on account of which he was amerced, and that he held of the King 'but not by

<sup>1</sup> 'Henry the Third is reported to have reckoned that above two hundred properties, denominated Baronies, existed in his time; the remaining records afford proof of the existence of a very large number of such Baronies, and except in the instances already mentioned, there appears to have been no claim of a seat in Parliament in respect of such Baronies.' Third Report on the Dignity of a Peer, p. 242.

barony<sup>1</sup>. He was undoubtedly summoned, by writ, to Parliament before and after this contention<sup>2</sup>.

But it is not so easy to ascertain whether in the thirteenth and fourteenth centuries persons were summoned who did not hold of the King at all.

Mr. Hallam tells us that it is assumed and stated, without denial, but also without proof, that persons were summoned who did not hold of the Crown<sup>3</sup>. Conflict-  
ing  
opinions.

Dr. Stubbs says that 'for the period before us'—the reign of Edward I—'membership of the Parliamentary baronage implies both tenure and summons<sup>4</sup>.'

The Report on the Dignity of a Peer suggests that tenure was not a condition precedent to summons<sup>5</sup>, but the case of Warine de L'Isle, who held a barony of a mesne Lord and yet was summoned to Parliament, is the only authority for the suggestion, and the case was regarded at the time as exceptional.

In the course of the reign of Edward III an alteration took place in the wording of the writ of summons which may indicate a change in the conditions of summons. The peer was bidden to attend—not *in fide et homagio*, but—*in fide et ligeantia*. This change did not take place at once. The words *homagium* and *ligeantia* were used, sometimes one, sometimes another, sometimes both, indiscriminately from 1348 to 1373, after which latter date the peer was regularly summoned *on his faith and allegiance*.

One cannot safely say more than this: Tenure of the Crown by barony created a liability though it did not give a right to a writ of summons; but it is not easy to fix an approximate date at which the summons came to be independent of tenure. Whether or no the King uniformly or habitually confined his summons to such as held of himself, the estate of the baronage was ultimately Baronage  
ultimately  
defined by  
summons.

<sup>1</sup> 19 Ed. II; Madox, History of the Exchequer, ch. 14, s. ii. *ad fin.*; and see Pike, Hist. of House of Lords, 235-6.

<sup>2</sup> See the lists of persons summoned to the Parliaments of Edward II and Edward III in the Appendix to the Report on the Dignity of a Peer.

<sup>3</sup> Hallam, Middle Ages, iii. 123.

<sup>4</sup> Stubbs, Const. Hist. ii. 192.

<sup>5</sup> Report, p. 243; and see Pike, Const. Hist. of House of Lords, 117.

constituted and defined, not by conditions of birth or of tenure, but by the exercise of the royal prerogative in issuing the writ of summons.

Here-  
ditary  
right, how  
acquired.

In one respect the discretion of the Crown was subject to an important limitation. A writ of summons conferred a right to be summoned upon the heirs of the first recipient of the writ, if only he had obeyed it and taken his seat. The date from which a writ of summons operates in this way so as to create an hereditary peerage has been variously stated. Lord Redesdale in the *L'Isle* case would fix it at the fifth year of the reign of Richard II; he regards the rule as settled by the statute 5 Ric. II, st. 2, c. 4, which Lord Coke interprets, and seemingly with good ground for so doing, to be merely declaratory of existing practice<sup>1</sup>. Mr. Hallam would place it later<sup>2</sup>. Bishop Stubbs tells us that it is convenient to adopt the year 1295 as the era from which the baron whose ancestor has once been summoned and has once sat in Parliament can claim an hereditary right to be so summoned<sup>3</sup>. Professor Freeman thinks that Dr. Stubbs fixes the date a little too rigidly, but holds that after 1295—

‘The tendency is to the perpetual summons, to the hereditary summons; from that time anything else gradually becomes exceptional; things had reached a point when the lawyers were sure before long to lay down the rule that a single summons implied a perpetual and an hereditary summons.’

## § 2. *Legal difficulties in defining the estate of the Baronage.*

Difficul-  
ties from  
mode of  
creation;

We may say that from 1295 onwards the general rule obtained that the Parliamentary baron acquired his rank and his right to vote by writ of summons followed by the taking of his seat. The earl was created by formal investiture with the sword, frequently in Parliament, and he received a charter, or later letters patent, declaring the

<sup>1</sup> Report of proceedings on claim to the barony of *L'Isle*, ed. Nicolas, p. 200. Mr. Pike, *Const. Hist. of House of Lords*, pp. 94-100, seems to agree, as to dates, with Lord Redesdale rather than with Dr. Stubbs.

<sup>2</sup> Hallam, *Middle Ages*, iii. 125.

<sup>3</sup> *Const. Hist.* ii. 184.

<sup>4</sup> *Encyclopædia Britannica*, Tit. *Peerage*.

dignity conferred upon him and limiting its devolution. As the other ranks of the peerage were called into existence the grant was in like manner evidenced by charter or patent. Richard II conferred a barony in this manner. The practice was not repeated in the case of baronies until the reign of Henry VI, but thenceforth it became the usual mode of creating Parliamentary baronies as well as other ranks in the peerage, and tended greatly to simplify questions which from time to time arose as to the rights to disputed peerages.

For the patent was evidence of title and indicated the line in which the peerage was to descend, usually to the heirs male of body of the grantee; while the titles of baronies which depended upon the writ of summons were complicated, not merely by the greater difficulty of proof, and by the fact that they passed to heirs lineal, and were not limited to the male line, but undoubtedly by the fact that for a long time an impression prevailed that they were connected with the holding of land, and hence that they might be dealt with like so much landed property<sup>1</sup>.

from connection with tenure.

From this connection, right or wrong, of barony with tenure some curious results arose.

Prynne tells us<sup>2</sup>, but without giving much authority for the statement, that baronies by tenure were alienated by sales and gifts 'so as to confer the right of summons on the new owner.' It may not be easy to find proof of Prynne's assertion, but at any rate there seems no doubt that holders of baronies exercised a power of limitation so as to exclude heirs general in favour of a particular line of descent. Thus William Baron Berkeley in the reign of Henry VII, having barred the entail of the castle, lands and other hereditaments, including, as was considered at the time, the Parliamentary barony, settled the same on King Henry VII, in tail male with remainder to his own

Alienation of baronies.

<sup>1</sup> We may note the effect, in confirming the idea that baronies were by tenure, of the position of the mitred abbots who asked to be excused attendance on the ground that they did not hold baronies in the sense of land baronies. Stubbs, *Const. Hist.* iii. 459.

<sup>2</sup> Brief Register, p. 239.

right heirs; the Parliamentary barony thereupon remained in abeyance until the death of Edward VI, when the heirs male of Henry VII failed and the remainder took effect in favour of the great-grandson of William's brother, who was then summoned to Parliament in right of the barony.

Tenancy  
by the  
curtesy.

Again, until the end of the sixteenth century a commoner marrying a baroness in her own right became entitled to a writ of summons during her life. Henry VIII thought it objectionable that 'a dignity should shift from the husband on the death of the wife', and, in a case where a man claimed a dignity in right of his wife, laid down the rule that unless there was issue of the marriage, so as to make the husband a tenant by curtesy of England, he should not enjoy his wife's dignity. The right was thus narrowed, but until the *Willoughby*<sup>2</sup> case (1580) it was held that a tenancy by the curtesy in a peerage existed during the lifetime of the father to the exclusion of the eldest son, though of age<sup>3</sup>.

Surrender  
of baro-  
nies.

The surrender of a barony to the Crown by the process of levying a fine suggests the connection of the right or liability to be summoned to Parliament with the tenure of an estate. The surrenders of peerages which took place before the seventeenth century appear to have been surrenders either of earldoms which had the character of offices, or of peerages created by letters patent which might be returned to the Chancery whence they came. In the year 1640 a fine had been levied of a barony which was created not by letters patent but by writ, and the fine was held good.

These practices have ceased to be lawful in consequence of the gradual definition and establishment of custom by a series of resolutions or decisions of the House of Lords on disputed peerages. In the words of Lord Campbell, 'It is now fully settled that the law of the peerage of England depends entirely upon usage, both as to the power

<sup>1</sup> Collins, p. 11, and see Pike, Const. Hist. of House of Lords, p. 107.

<sup>2</sup> Ibid. p. 23.

<sup>3</sup> See Cruise on Dignities, and the cases there collected, pp. 106, 108.

of the Crown and as to any claim that may be made by a subject<sup>1</sup>.

The seventeenth century—and especially the latter part of the seventeenth century—may be looked upon as the period when the customs of the peerage were defined and reduced to the form in which they appear in modern text-books. And this was done by resolutions of the House passed upon cases referred to it for consideration by the Crown, or passed independently of such reference.

Thus in 1640 the House resolved in general terms that a peerage could not be alienated or transferred to another nor surrendered to the Crown. In the *Purbeck* case<sup>2</sup> in 1678 the House definitely held that a particular peerage could not be surrendered, nor the peer divest himself of his barony by the process of suffering a fine<sup>3</sup>.

In 1640 it was held in the *Ruthyn* case<sup>4</sup> that title to a peerage must originate in matter of record; that is, by writ or by a succession of writs or by patent. Such a decision would mean that the House would not accept the fact of the seat having been taken, or a ceremonial having been passed through, unless supported by documentary evidence of a certain sort.

In 1673 it was held in the *Clifton*<sup>5</sup> case that a man to whom a writ of summons is issued, and who in pursuance thereof takes his seat in Parliament, acquires thereby an hereditary peerage.

In 1677 comes the important decision in the case of the barony of *Freschville*<sup>6</sup>, that a Parliamentary barony is not constituted by the mere receipt of a writ of summons nor is the blood of the holder ennobled thereby. Proof must

<sup>1</sup> 8 H. L. C. 79. The rule as to surrender is described more concisely by Mr. Pike as 'Lord-made law of comparatively recent growth.'

<sup>2</sup> Collins, 306, and Lords' Rep. iii. 26.

<sup>3</sup> Lords' Rep. iii. 25, and see Collins, 301. The contention that a peer may evade the disabilities, without surrendering the rights, of a peerage and may continue to sit in the House of Commons if he refrains from asking for a writ of summons, might be regarded as an attempt at partial surrender. The attempt failed. *Supra*, p. 81.

<sup>4</sup> Collins, 256.

<sup>5</sup> Collins, 292.

<sup>6</sup> Lords' Rep. iii. 29.



be given that the summons was obeyed and the seat taken in order to perfect the title to the barony.

Nine-  
teenth-  
century  
cases.

How gradual has been the definition of the rights of the peerage, and of the Crown in relation to the peerage, is shown by the cases which have arisen in the nineteenth and present centuries. The right of the Crown to create a life peer with a right to sit and vote as a Lord of Parliament was not definitely negatived till 1858<sup>1</sup>, nor the right to create peerages with limitations unknown to the Common Law until 1876<sup>2</sup>. The right of the subject to claim a summons in virtue of holding certain lands, that is, to transfer a so-called barony by tenure, was settled adversely in 1861<sup>3</sup>, as was the right to surrender a peerage in 1907<sup>4</sup>.

So far I have tried to show how the baronage came to be an estate of the realm and a separate House of Parliament.

We now come to consider:—What are the limits on the right of the Crown to create peers;—what are the limits on the right of the Crown to summon peers;—what disqualifications may prevent a peer, duly created and properly summoned, from sitting and voting;—what there is individual or characteristic about the mode of creation or of summons in the case of each of the classes of peers enumerated on a preceding page;—what are the privileges of the House collectively or of its members individually.

### § 3. *Real or supposed restrictions on Creation.*

The restrictions on the right of the King to create peers are partly statutory, partly to be found in a series of decisions which determine the nature of the estate which the Crown may create in a dignity carrying with it the right to sit and vote as a Peer of Parliament.

The statutory limitations are imposed by the Acts of Union.

Limita-  
tions in  
Acts of  
Union.

The Act of Union with Scotland provides that the peerage of Scotland shall after that Act be the peerage of Great

<sup>1</sup> Hansard, cxl. 330.

<sup>2</sup> 8 H. L. C. 81.

<sup>3</sup> L. R. 2 App. Ca. 21.

<sup>4</sup> 1907, A. C. 10.

Britain, and makes no provision for any increase of the Scotch peerage, or for the maintenance of its numbers at their then existing figure. It would follow that if the King made a new peer of Scotland he would not be admitted to vote at the election of Scotch representative peers. Indeed an Act of the late reign<sup>1</sup> takes away the right to vote in respect of any peerage in virtue of which the vote has not been exercised since 1800.

The Act of Union with Ireland provides that the Crown may make one peer of Ireland for every three that become extinct after the Union until the number fall to 100, and that the number of Irish peers not entitled by the possession of other peerages to an hereditary seat in the House of Lords of the United Kingdom may be retained at that number by fresh creations if the King so please.

The Crown therefore cannot create a peer of Scotland; and can only create a peer of Ireland under the circumstances defined in the Act of Union with Ireland.

We now come to what may be described as the Common Law restrictions on the right of creation.

(a) The King cannot accept a surrender of a peerage once granted, and therefore cannot grant afresh a peerage the holder of which has gone through the form of surrender. That a peerage cannot be surrendered seems to have been a matter settled by judicial opinion and resolutions of the Lords based thereon in the seventeenth century. The opinion of Dodridge J. in the case of the earldom of Oxford<sup>2</sup> was adopted by the House in the *Grey de Ruthyn* case in 1640, when the House resolved that:—

‘No peer of the realm can drown or extinguish his honour (but that it descends to his descendants), neither by surrender, grant, fine, nor any other conveyance to the King.’

This resolution was acted on in the *Purbeck* case<sup>4</sup> in 1678, and the law seems to have remained unquestioned

<sup>1</sup> 10 & 11 Vict. c. 52.

<sup>2</sup> Collins, 190.

<sup>3</sup> Ibid., 256.

<sup>4</sup> Ibid., 293.

until very lately when the earldom of Norfolk was claimed by Lord Mowbray on the ground of a surrender of the earldom by Roger le Bygod to Edward I in 1302, and a regrant by Edward II of the same earldom to Thomas de Brotherton, by charter, in 1312. Lord Mowbray satisfactorily proved his descent from Thomas de Brotherton, but the Committee for Privileges, to whom the case was referred, reported that the claim was not established because the original surrender was invalid. Their Lordships took the law to be settled by the Purbeck case and held that the law thus settled had always been the law on the subject, although such a surrender might, erroneously, have been regarded as valid in the thirteenth and fourteenth centuries <sup>1</sup>.

Rules of  
descent  
must be  
followed.

(b) The King cannot create a peerage with limitations which involve a variation from the ordinary law of the country with regard to descent <sup>2</sup>. This has not always been regarded as settled law.

Devon  
case.

In the *Devon* peerage case <sup>3</sup> (1831) it was held that a grant of an earldom made to a man and *his heirs male* was good, a grant differing from an estate tail in the absence of words of procreation and from an estate in fee by reason of the restriction as to sex. In the *Wiltes* claim of peerage <sup>4</sup> it was held that a similar grant was bad. There were other reasons for holding that the claimant in the *Wiltes* case could not sustain his claim, for William le Scrope the first Earl of Wiltes was alleged to have forfeited his earldom, upon his execution, in the troubles which ended in the dethronement of Richard II. But Lord Chelmsford was clearly of opinion that the grant was bad. He asks

Wiltes  
case.

‘Whether it is competent to the Crown to give to a dignity a descendible quality unknown to the law, and thereby to introduce a new species of inheritance and succession?’ and adds, ‘the question put in this way seems to answer itself.

<sup>1</sup> [1907] A. C. 10. Brotherton had been summoned and had taken his seat, but this, apart from patent or charter, could confer no more than a barony, and the claim was for an earldom, and the charter, on which the title to summons was based, was held to be invalid.

<sup>2</sup> *Per* Lord Cairns, L. R. 2 App. Ca. 20.

<sup>3</sup> 2 Dow & Cl. 200.

<sup>4</sup> L. R. iv. H. L. 126.

The Crown can have no such power unless there is something so peculiar in a dignity, so entirely within the province of the Crown to mould at its pleasure, that a limitation void as to every other subject of grant is good and valid in the creation of a peerage. No one has pushed the argument to this extravagant length.

It should be observed that the law as laid down by Lord Chelmsford in the *Wiltes* case differed not only from that on which a Committee of Privileges had founded its conclusions in the *Devon* case, but was at variance with the opinions of two such eminent authorities as Coke and Cruise. Coke says that a writ of summons confers on the person summoned 'a fee simple in the barony without words of inheritance.' But he qualifies this statement almost immediately by saying that 'the writ hath no operation until he sit in Parliament and thereby his blood is ennobled to him and his heirs lineal<sup>1</sup>.' Cruise commenting on these *dicta* of Coke says, 'a person having a dignity by writ is not tenant in fee simple of it, for in that case it would descend to heirs general, whether lineal or collateral, of the person last seised; whereas a dignity of this description is only inheritable by such heirs as are lineally descended from the person first summoned to Parliament and not to any other heirs. It is in fact a species of estate not known to the law in any other instance except that of an office of honour<sup>2</sup>.'

Committees of Privileges do not consider themselves bound by previous resolutions of similar Committees, and the resolution in the *Devon* Peerage case, together with the opinions of the learned writers just cited, might have been thought to counterbalance the conclusions of the *Wiltes* peerage case, but for a more recent decision of the same character in the *Buckhurst* peerage<sup>3</sup> case. The barony of Buckhurst, created in 1864, was granted by patent to the Countess of De la Warr for her life with limitations over

<sup>1</sup> Co. Litt. [16. b] and see [9. b].

<sup>2</sup> Cruise on Dignities (1810), p. 100, and see Pike, Const. Hist. of the House of Lords, 124.

<sup>3</sup> [1876] App. Ca. 2. 1.

to her second and every other son in tail male. But towards the close of the patent a proviso was introduced to the effect that whenever the earldom of De la Warr and the barony of Buckhurst devolved upon the same person, the barony should shift over to the person who would be next entitled to succeed thereto if the person succeeding to the earldom were dead without issue.

The law  
settled.

Lord Cairns pointed out that the patent proposed to deal with a peerage as a shifting use, that such shifting of an estate could only take place by virtue of the Statute of Uses, which turned uses into legal estates and which could have no application to peerages, because a peerage could not be held to the use of, or in trust for, another. He then asked whether such a course of descent as the grant prescribed was possible at Common law, and holding, as indeed was clear, that it was not possible, he pronounced against the claim on the ground stated earlier in his judgment that 'a peerage, partaking of the qualities of real estate, must be made in its limitation by the Crown, so far as it is descendible, descendible in a course known to the law<sup>1</sup>.'

Baronies  
by tenure.

It remains to consider the vexed question of baronies by tenure, which, if they could be held to exist, would encroach upon the exclusive prerogative of the Crown to summon whom it will to its Councils and to the Lords' House of Parliament. But the question has been settled adversely to the existence of such baronies.

Berkeley  
case,

The Berkeley peerage case came to be decided in 1861<sup>2</sup>, upon a reference by the Crown to the House of Lords of a petition of Sir Maurice Berkeley to the Queen to be declared Baron of Berkeley and to receive a writ of summons to Parliament.

grounds of  
claim.

The ground of the petition was that Sir Maurice was for the time being entitled to the castle and lands constituting what had been the territorial barony of Berkeley; and it may be said shortly, that in order to prove his case the petitioner had to show, first, that the right to a writ of summons had shifted with the right to the castle and lands

<sup>1</sup> Buckhurst Peerage case, L. R. 2 App. Ca. pp. 29 and 20.   <sup>2</sup> 8 H. L. C. 21.

of Berkeley, and secondly, that it had shifted in such a way as to make a precedent for the disposition by will of a barony by tenure.

As to the first point the petitioner was able to make out a case. There were two settlements of the castle and territorial barony of Berkeley by which it might be alleged that the Parliamentary barony had been allowed to pass to the person for the time entitled under the settlement.

Of these settlements the first took place in the reign of Edward III, when Thomas, Lord Berkeley, with license from the Crown, settled the castle and lands constituting the territorial barony upon himself for life with remainder to his son Maurice in tail male. The result of this settlement was that when, in the third generation, male heirs failed in the direct line of descent, not only the lands but the writ of summons to Parliament went out of the direct line to the nearest male heir<sup>1</sup>. There seemed no doubt that this was a genuine exercise of a right to direct the devolution of a barony by tenure, and that the baron, summoned as just described, was recognized by the House of Lords as entitled to the same precedence as though he had been in the direct line of descent.

First  
settle-  
ment of  
barony.

The second settlement was more doubtful in its application to the matter in dispute. William Lord Berkeley, in the reign of Henry VII, having barred the entail above described by suffering a fine, settled the territorial barony upon the heirs of his body, with remainder to Henry VII, and the heirs of his body, with a reversion to his own right heirs. William died childless, and his lands passed under the settlement to Henry VII, and his brother Maurice was never summoned to Parliament. When Edward VI died childless the reversion fell in, and Maurice's great-grandson acquired the property and was summoned to Parliament, taking the precedence due to the ancient barony. But in the meantime, though Maurice Berkeley was never sum-

Second  
settle-  
ment.

<sup>1</sup> Maurice left sons of whom the eldest, Thomas, took the barony, but on his death left an only daughter, who was excluded from the succession by the entail. The barony passed to James, the nephew of Thomas and eldest grandson of Maurice, and this James was regularly summoned until his death in 1463.

moned to Parliament, his son Maurice was summoned, yet only as junior baron, and he never obtained the high precedence due to the old Berkeley barony. When Maurice died childless his brother Thomas was summoned, and on the death of Thomas, his son, also named Thomas, was summoned, and this last enjoyed the precedence of the old barony. Shortly before his death the reversion had fallen in by the death of Edward VI, and Thomas's son Henry obtained the Berkeley lands as well as the Berkeley peerage.

Upon these facts it seems open to question whether the Parliamentary barony was not recognized, with or without the precedence due to it, as vested in the heirs of William the settlor, during some part of the time that the territorial barony was vested in the Crown.

Why insufficient proof.

These two settlements made the strength of the claimant's case, because they afforded proof that a dealing with the castle of Berkeley affected the right of summons to Parliament. In consequence of the first, the right of summons had followed the castle out of the direct line of descent. In consequence of the second, the writ of summons had, at any rate for a time, ceased to be issued while the castle was vested in the Crown.

They were by deed and with licence ;

But the inadequacy of these settlements to establish the claimant's case arose from the fact that in each case the settlement was made by deed and with licence from the Crown, whereas the claim set up rested on a devise of the castle by will. The claimant had therefore to contend that modes of dealing with land unknown to the law at the date of the last settlement on which his case rested were applicable to baronies by tenure.

but the claim rested on a devise.

For since his claim rested on a devise, and since wills of land were not valid at the date of the last settlement which was used to prove a right to deal with the barony by the holder, the claimant, in order to establish his case, was obliged to assume that a barony by tenure, if it existed at all, was susceptible of the widest exercise of rights of alienation and disposition, rights which had come into existence at a later date than any precedent which he could allege. He could make no use of the saving clause in the Act ' for

taking away tenures *in capite* and by knight's service<sup>1</sup>, wherein it was provided that nothing in that Act should 'hurt any title of honour, feudal or other, by which any person hath or may have right to sit in the Lords' House of Parliament': for it was impossible for him to prove that any one had ever acquired such a right by devise.

The results of a decision in favour of the claimant would certainly have been startling; for he asserted, in the case of baronies by tenure, the existence of a right—

'By which a peer, of his own authority and according to his own caprice, might transfer the peerage to a stranger, might confer a privilege on this stranger to demand a summons from the Sovereign to sit in the great council of the realm, and might compel the unwilling sovereign to receive the homage of a peer so created<sup>2</sup>.'

The decision of the House of Lords coincided with the opinion given by the judges consulted in the *Fitzwalter* case, where—

'The nature of a barony by tenure having been discoursed, it was found that baronies by tenure had been discontinued many years and were not then in being, and so not fit to be revived or to admit any pretence or right of succession thereupon, and that the pretence of a barony by tenure was therefore not to be insisted on<sup>3</sup>.'

The King, then, has the exclusive prerogative of creating Summary. peers, and can do so at will, subject only to the restrictions (1) that he cannot create a peer of Scotland; (2) that he can only create a peer of Ireland under circumstances defined in the Act of Union with Ireland; and (3) that in directing the devolution of a dignity he is confined to limitations recognized by law in the case of other grants of real estate.

Beyond these restrictions the King's powers are unlimited: The Peer-  
but it would not be right to leave this part of the subject age Bill,  
without noting a proposal made in the year 1719 to confine 1719.  
within very narrow limits the creation of new peers.

<sup>1</sup> 12 Car. II, c. 24, s. 11.

<sup>2</sup> Per Lord Campbell, 8 H. L. C. 81.

<sup>3</sup> Collins, 287.



The Peerage Bill of Lord Sunderland would have closed the House of Lords to any increase in its numbers beyond six. The King was to be allowed to make six new peers; after which, new creations were only to take place on the extinction of existing peerages. The Scotch peerage was to be represented by twenty-five hereditary peers, which number was to be maintained by reinforcement from the remaining peers of Scotland as occasion required. The bill was rejected, and its provisions are matter of history. The successful attempt of Anne and her ministers in 1711 to pack the House of Lords by the creation of twelve new peers, and so to secure a majority for the Parliamentary approval of the Peace of Utrecht, was probably the ground of this venturesome proposal. It may not be much more venturesome to surmise that, if the ranks of the House of Lords had been closed in 1719, the House itself would hardly have been in existence with its present powers and privileges at the present day.

#### § 4. *Restrictions on Summons.*

For our purposes, which are mainly to consider the House of Lords, and not the Peerage generally, the limits upon the Crown's right of summons are more important than the limits upon its right to confer the Dignity of the Peerage. I will deal with all that exist or have been suggested with such comment or explanation as may appear to be necessary.

Tenure.

1. *Tenure.* Enough has been said on this point to show the character of the suggested limitation and the grounds on which, in the Berkeley peerage case, it was held not to exist. If baronies by tenure existed now they must be held with all the modern freedom of alienation and disposition, and the subject might therefore by sale or gift constrain the Crown to summon to its Councils and Parliament the man whom he might procure as his purchaser or select as his donee.

The historical uncertainty as to the existence of such baronies, and the practical absurdities which would follow

from their existence, combine to lead to the conclusion that, at any rate, in the language of the judges in the Fitzwalter case, they are 'not fit to be revived.'

2. *Scotch and Irish Peers.* I have already referred to the restrictions which are set upon the power of the Crown to create peerages of Scotland and Ireland. There are further restrictions upon its power to summon peers of Scotland and Ireland to sit and vote in the House of Lords.

The Act of Union with Scotland conferred upon all Scotch peers the same privileges as were enjoyed by the peers of Great Britain. The Act of Union with Ireland conferred upon all Irish peers the same privileges as were enjoyed by the peers of the United Kingdom of Great Britain and Ireland. But in each case the right to sit in the House of Lords otherwise than as representative peers under the conditions of their respective Acts of Union was excepted from these privileges.

So jealously was this exception guarded by the House of Lords that throughout the greater part of the eighteenth century it was maintained that the Crown could not confer upon a peer of Scotland a peerage of Great Britain which would entitle him to a writ of summons. The House came to this resolution in 1711, without reference from the Crown, in the case of the Duke of Hamilton (of the Peerage of Scotland), who claimed a seat as having been created Duke of Brandon in England<sup>1</sup>. This resolution was affirmed in 1719 in the case of the Earl of Soloway, created Duke of Dover.

The House of Lords endeavoured thus to impose a strange restriction upon the Crown's right of summons, maintaining that a Scotch peer, though not disqualified for receiving a peerage of the United Kingdom, was disqualified for receiving a writ of summons to sit and vote in the House.

But in the year 1781 another Duke of Brandon prayed for his writ of summons, and the judges were asked by the House of Lords to say whether he was incapable of receiving a writ because he was also Duke of Hamilton, or, in

<sup>1</sup> See debate and protest of dissentient peers. Cobbett, *Parl. Hist.* vi. 1047.

the terms of the reference, 'whether the Peers of Scotland be disabled from receiving, subsequently to the Union, a Patent of Peerage of Great Britain with all the Privileges usually incident thereto.' In 1782 the judges delivered a unanimous opinion in favour of the claim, and there is now no doubt that the Crown, though it cannot summon a Scotch or Irish peer (apart from the representative peers), yet may acquire the right to summon such a peer by conferring upon him a peerage of the United Kingdom.

Lords  
Spiritual.

3. *The Lords Spiritual.* The number of the Lords Spiritual sitting and voting in Parliament is now twenty-six—twenty-four bishops and two archbishops. An increase in the number of English bishops has not entitled the Crown to increase the number of Lords Spiritual summoned to Parliament, and the issue of the writ of summons is regulated by Acts of Parliament which provide for the creation and endowment of new Bishoprics.

The right  
of Crown  
limited by  
Statute.

In the Acts which establish the bishoprics of Manchester, St. Albans, and Truro, as well as in the Bishoprics Act of 1878<sup>1</sup>, it is provided that the number of Lords Spiritual shall in no case be increased by the foundation of these bishoprics, but that whenever there is a vacancy among the Lords Spiritual by the avoidance of any see in England or Wales other than the sees of Canterbury, York, London, Durham, or Winchester, the vacancy is supplied by the summons of the senior bishop who has not previously become entitled to a writ. The five sees above named confer a title to a writ of summons at once.

Between the years 1800 and 1869 one archbishop and three bishops of the Irish Church were summoned, in rotation of sessions, to the House of Lords, but the Irish Church Act, 32 and 33 Vict. c. 42, s. 13, provides that no archbishop or bishop shall henceforth be summoned to, or be qualified to sit in, the House of Lords by reason of his episcopal dignity.

Descend-  
ibility.

4. *Descendibility.* A very important limitation upon

<sup>1</sup> 41 & 42 Vict. c. 68, s. 5. This Act provided for the foundation of the bishoprics of Liverpool, Newcastle, Southwell, and Wakefield. Its provisions apply to the Bishoprics of Bristol, Southwark, and Birmingham.

the right of the Crown to issue the writ of summons is found in the hereditary character of the Lords of Parliament. The limitation may be stated and has been disputed in two ways: the Crown cannot withhold the writ from a man whose ancestor has been summoned by writ and has taken his seat; nor can it summon a man in pursuance of a patent limiting his peerage, and therewith the right to the summons, to the term of his life.

How it  
affects the  
right of  
summons.

The writ of summons issued without letters patent and followed by the taking of a seat, constitutes a descendible peerage, and this has been so held since the latter part of the seventeenth century, when the Clifton peerage was supported on the following grounds, thus expressed by the judges who were consulted:—

That Sir Jervas Clifton was summoned to Parliament by the name of Jervas Clifton of Leighton Bromswold, by writ, dated July 9. 9 Jac. I.

That he accordingly did come and sit in Parliament as one of the peers of England.

That he died 16 Jac. I, leaving issue behind him Catherine, his sole daughter and heir, who married to the Lord Aubigny, afterwards Duke of Lennox.

That the said Duke, 17 Jac. I, was by letters patent created baron Leighton of Leighton Bromswold, in the county of Huntingdon, to him and the heirs male of his body, whereof none are now living.

That the petitioner is lineally descended from him and is his heir (by the said report) and as such now claims the barony of Clifton.

All which being admitted to be true we are of opinion,

First, that the said Sir Jervas, *by virtue of the said writ of summons, and his sitting in Parliament accordingly*, was a peer and baron of this kingdom, and his blood thereby ennobled.

Secondly, that his said honour descended from him to Catherine, his sole daughter and heir, and successively after several descents to the petitioner as lineal heir to the said Lord Clifton.

Thirdly, that therefore the petitioner is well entitled to the said dignity<sup>1</sup>.

<sup>1</sup> Collins, 292.

**Life peers.** Again, if the Crown creates a peerage by letters patent with an accompanying writ, a limitation in the patent to the life of the grantee will be held to invalidate the grant, so far as it is intended to convey the right to a writ of summons.

The question arose and was argued at length and finally determined by a Committee of Privileges in the case of the Wensleydale peerage.

I must not, in this place, discuss the possible advantages of this contemplated action of the Crown; or how far the House might have been the stronger for a reinforcement, from time to time, of eminent men whose fortunes might be inadequate to support an hereditary peerage, though their abilities might increase the usefulness of a second chamber. We are concerned only with the legal aspect of the matter, and it may be stated as follows.

What the  
Crown  
might  
have done.

If the Queen had addressed a writ of summons to Baron Parke as Lord Wensleydale, and there had been no patent limiting the grant, the House could not have questioned the right of Lord Wensleydale to take his seat, nor could the Crown have refused a summons to Lord Wensleydale's heir after his death<sup>1</sup>. The first of these propositions was laid down by Lord Campbell in debate, and admitted; the second follows from the decision of the Clinton peerage case cited above. The words of Lord Campbell on the first point are significant.

'The writ without the patent is conclusive evidence of an intention to create a barony in fee, which is clearly within the prerogative of the Crown; but the writ *with the patent as clearly shows the intention merely to give operation to the patent*, and that the nominee shall have nothing beyond the dignity and privileges which the patent may lawfully confer<sup>2</sup>.'

The House, as we shall see later, enjoys the privilege of inquiring into the validity of new grants of peerage conferring the right to sit and vote, and was therefore entitled to examine the patent and see whether the prerogative of

<sup>1</sup> Hansard, cxl. 362.

<sup>2</sup> Hansard, cxl. 331.

the Crown was being exercised in accordance with the rights of the Peers of Parliament.

Lord Wensleydale's patent contained what were ultimately regarded as two repugnant clauses—a limitation of the peerage to the term of his life, and a special provision that he should be entitled to a writ of summons as a Lord of Parliament. <sup>What it did.</sup>

The right of the Crown to create a life peerage by patent was practically undisputed, but it was admitted that for four hundred years there had been no instance of a 'commoner being sent under a peerage for life to sit and vote in the House of Lords,' and it was contended that even before that time no such instance had been satisfactorily established <sup>1</sup>.

I will not follow the historical arguments of the learned lords who took part in the debate, but will be content with the summary of Dr. Stubbs as to the historical probabilities of the existence of Lords of Parliament who were life peers. <sup>Historical argument.</sup> There are, no doubt, cases which would seem to be cases of intermittent summons, or cases in which a man has been summoned during his life while his descendants have received no summons. Prynne has made out a list of these <sup>2</sup>, and founds upon it an argument that a writ of summons no more necessarily makes a man an hereditary peer of Parliament than the return of a man as knight of a shire makes him an hereditary member of the House of Commons. But Dr. Stubbs tells us that—

'On careful examination Prynne's list shrinks to very small proportions; some of the names are those of judges whose writs have been confusedly mixed with those of the barons; some occur only in lists of summons to councils which were not proper Parliaments. In most of the other cases the cessation of the summons is explained by the particular family history; for example, the son is a minor at the time of his father's death, and dies or is forgotten before he comes of age. In others, nothing is known of the later family history, and it must be supposed to have become extinct <sup>3</sup>.'

<sup>1</sup> Hansard, 3rd series, vol. cxl, p. 335.

<sup>2</sup> Prynne, Reg. i. 332, 333.

<sup>3</sup> Const. Hist. iii. 454.

Dr. Stubbs goes so far as to say that 'no baron was ever created for life only without a provision as to the remainder or right of succession after his death.'

Authentic  
cases of life  
peerages.

The well-authenticated cases of grants of life peerages appear to fall under three heads:—(1) grants for life of higher rank in the peerage to persons already entitled to a writ of summons in virtue of an existing barony; (2) grants of baronies for life, with an express provision that the bearers of the title should not sit in Parliament<sup>1</sup>; (3) grants of life peerages to women, mostly the mistresses of the last two Stuart and the first two Hanoverian kings.

None of these support the contention in favour of the legality of a creation of a Lord of Parliament for life, and if such creations had been proved to be the practice of the thirteenth and fourteenth centuries, the disuse of them for four hundred years would have been a formidable argument against the revival of such a prerogative by the Crown. If precedents were to be drawn from times when the rules of the constitution were in many respects indefinite, and from the exercise of prerogatives which for hundreds of years the Crown had been content to forego, we might have seen some strange results in the nineteenth century. As was pointed out in the debate, much of the Reform Act of 1832 was needless legislation if the Crown could have resorted to the power, which it undoubtedly exercised at one time, of issuing writs to new constituencies and withholding writs from others. Just as it was proposed that Queen Victoria should remodel the House of Lords, so William IV might have redistributed seats and remodelled the House of Commons, on the same principle, though necessarily on a larger scale.

Result of  
argument.

The Committee of Privileges reported against the claim of the Crown. The rule of law seems clear. The Crown can confer such dignities and with such limitations as it may please, but a Lord of Parliament must be an hereditary peer, except in the special cases of the bishops and the lords of appeal in ordinary; when once an hereditary peer is summoned the right to a summons descends to his heirs,

<sup>1</sup> Const. Hist. iii. 455, note 1; and see *Wensleydale case*, 5 H. L. C. 958.

except in the special case of the representative peers of Ireland<sup>1</sup>.

5. *Alienage*. The framers of the Act of Settlement<sup>2</sup> *Alienage.* went so far as to provide that no person born out of the kingdom, unless born of English parents, even though naturalized, might be a member of either House of Parliament. The Naturalization Act of 1870<sup>3</sup> enabled an alien to become naturalized, and so to acquire political rights; but the alien until naturalized is not qualified for any parliamentary or municipal franchise, or entitled to any right or privilege as a British subject except such rights and privileges in respect of property as are thereby expressly given to him.

It must be taken therefore that the Crown's right of summons is limited by the rule that none but a British subject may receive a writ of summons to the House of Lords.

6. *Bankruptcy*. A further limitation on the powers of *Bankruptcy.* the Crown must be noted in the case of bankrupt peers. The Bankruptcy Act<sup>4</sup> of 1883 disqualifies them from sitting and voting, but an unrepealed clause of the Bankruptcy Disqualification Act, 1871, provides that 'a writ of summons shall not be issued to any peer for the time disqualified from sitting or voting in the House of Lords<sup>5</sup>.'

### § 5. *Disqualifications for Sitting and Voting.*

There are some disqualifications which do not affect the royal right to issue the writ of summons, but which rest upon the individual peer. There would appear to be nothing to prevent the Crown from summoning such peers to attend, but a rule of law, or resolution, or standing order of the House would forbid them to sit and vote therein.

1. *Infancy* is such a disqualification, if not by the *Infancy.* common law of Parliament, at any rate by a standing order of the 22nd of May, 1685, to the effect that 'no lord

<sup>1</sup> The representative Peers of Scotland are not individually summoned.

<sup>2</sup> 12 & 13 Will. III, c. 2.    <sup>3</sup> 33 & 34 Vict. c. 14.    <sup>4</sup> 46 & 47 Vict. c. 52.

<sup>5</sup> 34 & 35 Vict. c. 50, s. 8. The general terms of this section must, I think, be limited by the title and purport of the Act.



under the age of one and twenty years shall be permitted to sit in this House.'

**Felony.** 2. *Felony* is now a disqualification similar in its character and effects to the like disqualification in the case of members of the House of Commons. For by 33 & 34 Vict. c. 23, the old rule as to corruption of blood is abolished, and, except in the case of outlawry, the forfeiture which ensued upon corruption of blood. A conviction of treason or felony, therefore, is no longer held to affect the nobility of blood of the convicted person; but it incapacitates him, if the conviction is followed by a sentence of a certain severity<sup>1</sup>, from sitting or voting as a member of either House of Parliament until he has either suffered his term of punishment or received a pardon under the great seal or sign manual.

**Sentence of House.** 3. *Sentence of the House.* It is presumed that the House of Lords could not, any more than the House of Commons, by mere resolution exclude a member of its own body permanently from taking a part in its proceedings. But it can disqualify by sentence, sitting as a Court of justice, either upon an impeachment by the House of Commons or, presumably, upon trial of one of its own members, in the full House if Parliament is sitting, if not, in the Court of the Lord High Steward. And this sentence passed by resolution of the House is an actual disqualification, and not, as in the case of the expulsion of a member by the House of Commons, a punishment which may or may not be temporary, as the person expelled does or does not obtain re-election.

Thus the sentence upon the Earl of Middlesex, Lord High Treasurer of England, impeached by the House of Commons for bribery, extortion, and other high crimes and misdemeanours, was settled by resolution of the House, before the Commons had demanded that sentence should be passed. Lord Middlesex was to be incapable of holding office, to pay a fine to the King, and then came:—

<sup>1</sup> The punishments which must follow conviction in order to produce this effect are penal servitude, or imprisonment with hard labour for any term, or without hard labour for a term of twelve months.

‘The sixth question, “Whether the Lord Treasurer shall ever sit in Parliament hereafter, or no?”

‘Agreed “that he shall never sit hereafter<sup>1</sup>.”’

Sentence to this effect was passed on sentence being demanded by the Commons. But the Crown can exercise the prerogative of pardon and so remove the disqualification and restore the right to sit and vote.

4. *The Oath.* The obligation of the Parliamentary oath was not imposed upon the Lords till more than a hundred years after it had been required of the Commons. But since 30 Car. II, c. 1, the law respecting the oath has been the same for the Lords as for the Commons, and it now depends on the Parliamentary Oaths Act, 1866, modified, so as to admit of affirmation in place of an oath, by 51 & 52 Vict. c. 46.

#### § 6. *Modes of acquiring right to sit and vote.*

I have now dealt with the limitations which are set upon the right of the Crown in respect of the creation of peers; with the further limitations which restrict the right of the Crown to summon those on whom it has conferred the dignity of the peerage; and with the disqualifications which, apart from any restrictions on the Crown’s right of creation or summons, may be a bar to a peer’s right to sit and vote. It remains to consider the process by which the right to sit and vote is acquired, before discussing the privileges of the Lords and their mode of transacting legislative and judicial business.

The right to sit and vote:

##### i. *Peers of the United Kingdom.*

A peer of the United Kingdom is now invariably created by letters patent, and these are accompanied with a writ of summons to the House. On his introduction to the House he presents his patent of peerage to the Chancellor, and this having been read is, together with his writ of

how acquired by peer of the United Kingdom

<sup>1</sup> *Lords’ Journals*, iii. 38a.

summons, entered upon the Journals of the House. At each successive Parliament he receives a separate writ of summons in the form set forth in an earlier chapter.

A peer who succeeds to his peerage during infancy is entitled to his summons when of full age; a peer who succeeds when of full age is entitled at once and makes application to the Chancellor for a writ. The mode of application rests upon custom. Usually, a near relation of the peer who desires to claim his writ of summons makes a communication to the Lord Chancellor. The peer then produces certificates of his father's marriage, of his own baptism and of his father's burial, an extract from the Journals of the House showing that the late peer took his seat, and the patent which directs the devolution of the peerage. A near relative makes a declaration that the person described in these documents is the peer who claims his seat. Unless the case is one of doubt the writ is issued at once, and he takes his seat without the formalities required in the case of a newly created peer. If the case should be doubtful, the Chancellor may decline to order the issue of the writ. The claimant must then petition the King, through the Home Office. The process by which a doubtful claim is dealt with will be described below <sup>1</sup>.

It would seem that if a peer on succeeding to his peerage did not apply for his writ of summons he would nevertheless be liable to be summoned, and a high authority has maintained that, whether he did or did not make application, it would be the duty of the Lord Chancellor to issue a writ to a Peer whose title was beyond question <sup>2</sup>.

<sup>1</sup> *Post*, pp. 224, 225.

<sup>2</sup> Evidence of the Clerk of the Crown in Chancery. Report on Vacating of Seats, p. 21. Commons' Papers, 1894 (278). There have been cases, in recent times, of peers holding permanent offices in the Civil Service which, by the rules of the Service, may not be held together with a seat in either House. The peer, under these circumstances, upon succeeding to his peerage, has not applied for his writ of summons and has thus avoided the disqualification for office which a seat in Parliament would involve.

But the liability to a summons remains. The office, which is under

ii. *Representative peers of Scotland.*

The Act of Union with Scotland makes no provision for by Scotch any addition to the Scotch peerage, so it is not necessary to go behind the process by which the Representative peers obtain their right to sit and vote.

It is provided by 6 Anne, c. 23 (78, in revised Statutes), that whenever a new Parliament is summoned, a proclamation should be made under the Great Seal, commanding the peers of Scotland to meet in Edinburgh, or at such other place and at such time as is named in the proclamation. This proclamation has to be published at the Market Cross at Edinburgh, and in all the county towns of Scotland ten days at least before the day of election<sup>1</sup>. By custom the election takes place at Holyrood, and is marked by some curious features.

The Peers sit at a long table, and the roll of peerages is called over by the Lord Clerk Register: each answers to the peerage in right of which he is present. The roll is a roll not of peers but of peerages, so that the same peer may be called two or three times if he happens to represent more peerages than one: nor is there any mode of disputing, at the time, the right of any one to be present who answers to a peerage called. The roll is then called a second time, and each peer rises and reads out his list of those for whom he desires to vote. No peer may vote more than once, though he may represent more than one peerage. At the conclusion of this part of the proceedings proxies are handed in, the Lord Clerk Register then reads out the list of sixteen elected peers, and makes a return, which he signs and seals in the presence of the assembled peers.

any circumstances held at the pleasure of the Crown, is thus held not only subject to dismissal but to disqualification by summons.

The suggestion that a seat in the House of Commons is tenable under such conditions has been repudiated by the House.

<sup>1</sup> It seems strange that in 1874 the officials concerned in the conduct of the election of Scotch peers did not appear to be aware that the time had been shortened from the period of twenty-five days required by the Act of Anne; 14 & 15 Vict. c. 87. See Report on the Representative Peerage of Scotland and Ireland, p. 21. Lords' Papers, 1874 (140).

The Return is then sent to the Clerk of the Crown in Chancery, and by him transmitted to the Clerk of the House of Lords. The elected Scotch peer does not therefore receive a special summons, but presents himself to take the oath, which is preliminary to taking his seat, in right of his election as evidenced by the list supplied to the Clerk of the House: he then enjoys his right to sit and vote during the continuance of that Parliament. The rules of election seem to offer opportunities for the giving of votes by persons not entitled to vote; for those who are assembled as representing the peerages on the roll are not required to offer any evidence of their right to be present. So when a peerage is called the Lord Clerk Register is compelled to receive any votes tendered in respect of it except in so far as he may be debarred by a clause in the Act about to be referred to.

An Act of the late reign<sup>1</sup> has, though inadequately, attempted to supply a remedy for this inconvenience. It provides—

Legisla-  
tion of  
1848.

1. That peerages in respect of which no vote has been given since 1800 shall be struck off the roll, and no vote accepted from persons claiming to represent them unless the House of Lords should specially give direction to that effect. § 1.

Scotch  
represent-  
ative  
peers.

2. That if a right to vote is disputed, any two peers present may enter a protest, and the Lord Clerk Register is thereon bound to send the proceedings to the Clerk of Parliaments, and the claim is considered by the House of Lords in Committee of Privileges if application is made for such inquiry. § 3.

3. That if a claim has been established in the case of an individual to a particular peerage, no vote is to be received in respect of that peerage from any other than that individual during his lifetime. § 4.

Nevertheless it may happen that a man without any right to vote may vote, and vote unquestioned, unless two peers present should think it worth their while

<sup>1</sup> 10 & 11 Vict. c. 52.

to protest, and further to move the House of Lords to inquire into the validity of the vote.

It was held, by a Committee of Privileges in 1786, that a Scotch representative peer on accepting a peerage of the United Kingdom vacated his seat as a representative peer. There is, however, an instance to the contrary in the Parliament of 1886-92<sup>1</sup>. The matter seems doubtful.

### iii. *Representative Peers of Ireland.*

The Act of Union with Ireland provides for the reduction of the number of Irish peers to one hundred, but enacts that until that limit is reached the Crown may create one new peerage for every three which become extinct, and that when the number is reduced below one hundred from any cause 'it shall and may be lawful' for the King to keep the number up to one hundred exclusive of such Irish peers as may be entitled to hereditary English peerages.

Of the Irish peerage twenty-eight are elected as representatives of the whole body in the House of Lords, and each representative peer enjoys his right as a Lord of Parliament for the term of his life.

All the peers of Ireland are entitled to vote at the election of the representative peers, and their right to vote is certified by the Chancellor of England through the Clerk of the Parliaments to the Clerk of the Crown in Ireland, in each case of a new peer becoming entitled to be placed on the voting roll.

When an election has to be made, owing to the death of a representative peer, a certificate of the death is sent by two other such peers to the Lord Chancellor of England, who thereupon issues a writ to the Chancellor of Ireland directing him to provide for the holding an election.

The person responsible for the conduct of the election is the Clerk of the Crown and Hanaper in Ireland, who on receipt of a warrant from the Chancellor sends voting papers to all the peers who have proved to the House their right to be on the Roll and who apply for papers. The

<sup>1</sup> See May (ed. 11), p. 11, and Pike, Const. Hist. of House of Lords, p. 362.

Mode of  
voting.

voting papers are sent in duplicate, each form having a writ attached to it; the peer fills up the duplicate papers, seals them and sends them to the Clerk of the Crown. But before filling up the paper he is required to take the oath of allegiance before a judge in England or Ireland, a privy councillor, an ambassador or secretary of an embassy abroad, or a justice of the peace for any Irish borough or county. It may well happen that an Irish peer not resident in Ireland has some difficulty in satisfying this requirement. And as a matter of fact, Irish peers do lose their votes because they cannot, without great inconvenience, present themselves before any of the persons qualified to administer the oath.

After a lapse of thirty<sup>1</sup> days from the day of the issue of the writ the poll is closed, and the Clerk of the Crown hands in one copy of the writs and voting papers at the Bar of the House of Lords, together with a certificate stating the number of votes given for each peer who has been voted for, and who it is that is elected<sup>2</sup>. The elected peer is entitled to a writ of summons on his election and at each successive Parliament.

No vacancy is created among the Irish representative peers by the promotion of any one of them to a peerage of the United Kingdom.

#### iv. *The Lords Spiritual.*

*Ante*,  
p. 56.

Process of  
creation.

The form of writ addressed to the Bishop or Archbishop entitled to a summons to the House of Lords has been given earlier, and it has been noticed that the royal right of summons in respect of bishoprics is limited by the Acts which provided for the creation and maintenance of new bishoprics. It remains to consider the process by which

<sup>1</sup> 45 & 46 Vict. c. 26.

<sup>2</sup> In the Session of 1908 resort was had to the quaint procedure provided by the Act of Union for the case of an equality of votes between two candidates. Lords Ashtown and Farnham obtained an equal number of votes. Their names were written on two pieces of paper, similar in form, these were put into a glass, and the Clerk of the Parliaments, Sir Henry Graham, drew out one. Lord Ashtown's name was drawn, and he was declared duly elected. *Hansard*, 4th Ser. vol. cxcv, p. 1129.

a person in holy orders becomes a bishop, and the steps by which his title to summons is perfected, subject to the limitations which I have mentioned as to the number of lords spiritual who may be lords of Parliament.

On a vacancy in a bishopric or archbishopric, the first stage in the proceedings is the notification of the vacancy by the dean and chapter to the Crown in Chancery. The Crown thereupon sends them a *congé d'élire*, together with letters missive containing the name of the person whom they are desired to elect. The *congé d'élire* is a form: if the election is not made in accordance with the letters missive within twelve days of their receipt the Crown appoints by letters patent<sup>1</sup>.

The next stage in the process, following upon the election by the dean and chapter, is the consent of the person elected: he must signify this before a notary public, and make oath and fealty to the Crown. He does this immediately before, and as part of, the business of his confirmation. He thereupon becomes Lord Bishop elect. It remains that he should be confirmed in his election, consecrated, and enthroned.

The confirmation is brought about by the issue of letters patent under the great seal,—in the case of a bishopric, to the archbishop of the province; in the case of an archbishopric, to four bishops, or to one archbishop and two bishops. The ceremony takes place before the vicar-general of the province. The forms of confirmation are solemn, elaborate, and idle. A proctor represents the dean and chapter by whom the bishop has been elected. He presents to the vicar-general the letters patent requiring the election to be confirmed, and requests that opposers of the confirmation may be publicly called upon to show cause against the proceedings about to be taken. They are called, but, if they should appear, they will not be heard.

<sup>1</sup> 25 Hen. VIII, c. 20. Where, as in the case of a new bishopric, there is no dean and chapter, the Crown appoints at once by letters patent. The modes of giving authority for consecration in the cases of suffragan, Indian, colonial, and missionary bishops are described in vol. ii. The Crown, ed. 3, Part II, pp. 247-50.



The  
opposers.

On the occasion of the confirmation of Dr. Hampden who had been appointed and elected to the bishopric of Hereford, opposers were present and were prepared to state reasons against the confirmation. The vicar-general refused to hear them, and when they applied to the Court of Queen's Bench for a *mandamus* to compel a hearing of their objections<sup>1</sup>, the Court was evenly divided on the question whether the *mandamus* should issue or not: consequently the matter went no further.

Their  
right to  
a hearing.

On the occasion of the confirmation of the election of Dr. Gore to the bishopric of Worcester certain objectors to the appointment took proceedings in the King's Bench Division to obtain a *mandamus* to compel the archbishop and his vicar-general to grant them a hearing. The Court held, after an elaborate argument, that the Act 25 Henry VIII, c. 20, was clear in requiring the confirmation to take place forthwith, that no case had arisen since the passing of the statute in which objections had been entertained by the archbishop, and that he had no jurisdiction to entertain objections as to doctrines held or opinions expressed by the bishop prior to his appointment and election<sup>2</sup>.

Con-  
ditions  
under  
which  
a hearing  
might take  
place.

It was admitted that circumstances, wholly unexpected and abnormal, arising subsequent to the appointment and before the confirmation, might entitle the archbishop to give a hearing with a view to ascertaining whether the confirmation should be postponed until the facts alleged were brought to the knowledge of the advisers of the Crown. It was also suggested by the Court that the language of the citation might be somewhat modified, so as to indicate more clearly the formal character of the proceedings, and it would seem that the archbishops might provide such a procedure<sup>3</sup> as would enable reasonable objections to be heard, or else might divest the process of confirmation of a meaningless ceremonial and reduce it to a formal act.

<sup>1</sup> *Reg. v. The Archbishop of Canterbury*, 11 Q. B. 483 (1848).

<sup>2</sup> *R. v. Archbishop of Canterbury* [1902], 2 K. B. 503.

<sup>3</sup> See report of proceedings in the Convocation of Canterbury, in *The Times* of Jan. 28, 1897, p. 8, and see the remarks of the Archbishop of Canterbury when objection was taken to the confirmation of the Archbishop of York in *The Times*, Jan. 21, 1909.

When the confirmation is concluded the vicar-general commits to the bishop elect the care, governance and administration of the spiritualities of his see and decrees that he should be enthroned. The bishop then acquires the rights as to spiritual discipline and jurisdiction which belong to his office, but he is not entitled to its temporalities until after consecration. When this has taken place he does homage to the King for the temporalities of his see, and takes an oath of fealty to him. He thereupon becomes entitled in his turn, or at once if he holds a bishopric which confers a seat in Parliament immediately, to his writ of summons to the House of Lords.

Consecra-  
tion.  
Homage.

Whether a bishop sits in the House of Lords in virtue of a temporal barony, or of his ecclesiastical status, is a matter of purely historical interest. Doubtless the bishop was summoned to the Witan in his spiritual capacity, as to an assembly of the wise. It is also beyond question that the bishops and many of the abbots, after the Conquest, held their lands of the Crown as temporal baronies. But the conditions under which bishops were summoned to Parliament when Parliament came into existence are not so clear. They were summoned to sit, and they sat, with the estate of the baronage. They were bidden by the *Præmunientes* clause to summon the clerical estate. If we regard the early Parliaments as called together mainly to vote supplies to the Crown, we may suppose that the estate of the clergy was summoned to ensure a due contribution from that estate, and that the bishops and abbots, holding temporal baronies, were summoned in virtue of these, and with the same object. If we regard these Parliaments as Councils of the Crown, and assume that the bishops were summoned as counsellors, it is still difficult to dissociate them from the baronage, because the Norman and Plantagenet councils were assemblages of the great feudal vassals.

Do bishops  
sit as tem-  
poral  
barons,

In support of the view that the bishop sits in virtue of his spiritual functions may be urged, firstly, the difference in the form of his writ. He was summoned 'fide et dilectione,' and now 'on his faith and love,' not like the temporal peer, on his 'faith and allegiance.' Again, during

or in right  
of spiritu-  
alities?

a vacancy in the bishopric, or during the absence of the bishop in foreign parts, the guardian of the spiritualities was summoned in his place.

Thus in the eleventh year of the reign of Henry VII writs of summons were issued ;

*'Custodi spiritualitatis episcopatus Lincolnensis, sede vacante.'*

*'Custodi spiritualitatis episcopatus Bangorensis, ipso episcopo in remotis agente.'*

At the present time the homage done to the King for the temporalities of the see, and the oath of allegiance taken, suggest that the bishop sits as a baron. On the other hand neither the bishops created in the reign of Henry VIII nor those who occupy the sees created in the last and present reigns have ever held baronies, and now that the lands of bishoprics are transferred to the Ecclesiastical Commissioners, any conclusions which may be founded on the connection of barony and tenure must be regarded as obsolete. Whatever he may once have been, the bishop is now a Lord of Parliament in virtue of his office<sup>1</sup>.

In respect to the right to be tried by peers in the Court of the Lord High Steward, or of taking part in such trials, or in impeachments, the bishops have lost the position, which they once undoubtedly claimed, as peers of the realm<sup>2</sup>. On the one hand they claimed exemption, not only from the Court of the Lord High Steward, but from all secular jurisdiction. On the other hand they could not, as ecclesiastics, pass sentence of death<sup>3</sup>, and so if they were summoned to serve in the Court of the Lord High Steward they were at one time held entitled to appear by a Proctor<sup>4</sup>.

The result of this was that they were excluded from trial in the Court of the Lord High Steward without obtaining immunity from other jurisdictions, and that, as the Court consisted, for a long time, of persons specially summoned,

<sup>1</sup> See Pike, *Constitutional History of the House of Lords*, ch. ix.

<sup>2</sup> Pike, *Const. History of the House of Lords*, pp. 157, et sq.

<sup>3</sup> *Constitutions of Clarendon*, § xi.

<sup>4</sup> *Year Book*, 10 Ed. IV, no. 17, p. 6.

the bishops, who could not take part in passing sentence, were left out.

Finally, the Lords in 1692, resolved that 'Bishops who are only Lords of Parliament are not Peers, for they are not of trial by nobility<sup>1</sup>, and as a corollary to this it was laid down by Blackstone that as the bishops have no right to be tried in the Court of the Lord High Steward, they 'therefore surely ought not to be judges there<sup>2</sup>.'

The bishop sits in the House of Lords in virtue of a writ of summons in the form given in an earlier chapter, and *Ante*, p. 56. subject to the limitation of number stated in § 4. 3. of this chapter.

A bishop may resign his see and therewith lose his seat in the House of Lords<sup>3</sup>, though he retains 'his rank, dignity, and privilege.'

#### v. *The Lords of Appeal in Ordinary.*

I do not propose to enter here upon the judicial functions of the House of Lords: it is enough to say that for most <sup>Lords of Appeal ;</sup> purposes it is a final Court of Appeal from the King's Courts in England, Scotland and Ireland: that there is nothing but the conventions of the House to prevent any peer of Parliament from taking part in such Appeals, but that an Act of 1876, the Appellate Jurisdiction Act<sup>4</sup>, has provided that no appeal shall be heard or determined unless there are present at such hearing and determination at least three Lords of Appeal. The Lords of Appeal are of three kinds, (1) the Lord Chancellor for the time being, (2) such Lords of Parliament as have held high judicial office, (3) the Lords of Appeal in ordinary. It is with these last that I am concerned. They form an exception to the general rules which govern the tenure of a right to sit and vote in the House of Lords, and like the bishops they transmit no rank or dignity to their descendants.

<sup>1</sup> Standing Orders of the House of Lords, LXXIII.

<sup>2</sup> Blackstone, Comm. iv. 265. This matter is fully discussed by Mr. Pike, Const. History of the House of Lords, pp. 212-223.

<sup>3</sup> 32 & 33 Vict. c. 111, s. 5.

<sup>4</sup> 39 & 40 Vict. c. 59, amended by 50 & 51 Vict. c. 70.

under the  
Act of  
1876;

The Appellate Jurisdiction Act of 1876 gave power to the Crown to appoint two Lords of Appeal in ordinary. Their number has been increased to four as the paid members of the Judicial Committee died or retired<sup>1</sup>. They must possess certain qualifications—that is, they must have held, for two years, high judicial office, or have practised at the English, Scotch or Irish Bar for fifteen years; they are entitled to salaries of £6000 a year; and, as judges, they hold office on a like tenure to other judges, during good behaviour, unaffected by the demise of the Crown, but removable on an address of both Houses of Parliament.

It is practically necessary that one Lord of Appeal should be chosen from the Scotch Bench or Bar owing to the differences which exist between Scotch and English private law; it is usual though not necessary that the Irish Bench or Bar should be similarly represented among the Lords of Appeal.

are life  
peers.

Besides this, each Lord of Appeal is entitled to the dignity of Baron for his life, and to a writ of summons to attend, and to sit and vote in the House of Lords. Until 1887 his right to a summons was dependent on the continuance of his discharge of judicial functions. It is now a right which lasts for the term of his life.

The Peers of the United Kingdom are the only members of the House of Lords whose right to sit and vote is descendible. Of the rest, the representative peers of Ireland and the Lords of Appeal enjoy a right necessarily coextensive with the term of their lives. A Scotch representative peer may lose his seat by non-election, or vacate it by the acceptance of a peerage of the United Kingdom; a bishop may resign his see, and with it his right to be summoned to Parliament.

Introduc-  
tion of  
peers.

The formalities of the introduction of peers rest on the standing orders of the House of Lords.

A peer by descent needs no introduction, but may take his seat at any time after attaining the age of twenty-one. Peers who are summoned in virtue of newly created peer-

<sup>1</sup> Vol. ii, The Crown, part ii, p. 292 note.

ages, or in virtue of special limitations in remainder in patents of old peerages, are introduced by two peers, their patents presented to the Chancellor and read by him, and their writs of summons also presented. The patent and writ are both entered on the Journals of the House. This rule does not of course apply to the Scotch representative peers. The taking and subscription of the oath or affirmation of allegiance completes the title to the seat.

We may note here the ranks and precedence of the members of the Peerage. The title of Duke was first conferred on a subject by Edward III, who created his son, the Black Prince, Duke of Cornwall. That of Marquis dates from the reign of Richard II. Earldoms date from Saxon times. The first Viscount was created by Henry VI; and when we come to the origin of the lowest rank of the peerage, that of Baron, we must recur to the antiquarian discussion of a few pages back.

The station of the peers and their precedence within the House are regulated by 31 Henry VIII, c. 10, 'for placing of the Lords.' This Act recites that 'in all great councils and congregations of men having sundry degrees and offices in the Commonwealth, it is very requisite and convenient that order should be had and taken for the placing, and sitting of such persons as are bound to resort to the same,' and then proceeds to order the placing of the Lords. The royal children alone have place beside the King. First on the right-hand side was to sit the King's vice-gerent, then the two archbishops, the bishops of London, Durham, and Winchester, and the others 'after their ancienties.' On the left-hand side were to sit first the Lord Chancellor, the Lord President of the Council, the Lord Privy Seal, above all dukes save such as were of the blood royal. Other great officers were to sit above all peers of a like rank to themselves. Such were the great chamberlain, the constable, marshal, lord admiral, lord steward, and King's chamberlain. The King's secretary if a baron was to sit above all other barons, if a bishop above all other bishops. Then it was provided that 'all Dukes, Marquesses, Earls, Viscounts and Barons not having any of the offices aforesaid shall sit and

Rank and  
precedence of  
peers.

The  
placing of  
the Lords.

be placed after their ancienties as it hath been accustomed.' Such great officers as were not peers were to sit in the middle of the chamber<sup>1</sup>.

### § 7. *Privileges of the House of Lords.*

Privileges  
of the  
Lords.

The privileges of the House of Lords may be dealt with more shortly than those of the Commons. They have less frequently brought the House into conflict with the Crown, and very rarely with the Courts. Perhaps the most important are those concerned with the judicial duties of the House. I will take them in the order in which I dealt with the privileges of the House of Commons, and will note such correspondence or difference as may exist.

Speaker of  
the Lords.

Firstly, the Lords do not go through the form of asking for their privileges. The Speaker of the House is, by prescription, the Lord Chancellor or Lord Keeper of the Great Seal; in his absence his place is taken by deputy Speakers, of whom there are always several, appointed by commission, and if they should all be absent the Lords elect a Speaker for the time being. The woolsack on which the Speaker sits is outside the limits of the House, so that the office may be discharged by a commoner, and has been so discharged when a commoner has been Lord Keeper of the Great Seal, or when the Great Seal has been in commission<sup>2</sup>. Nor has the Speaker of the House of Lords the authority on points of order, nor the dignity in relation to the other members of the House, which is possessed by the Speaker of the House of Commons.

Officers of  
the House.

The permanent officers of the House are the Clerk of the Parliament, whose duties are to keep the records of the proceedings and judgments of the House; the Gentleman Usher of the Black Rod, whose duties answer to those of the Serjeant-at-Arms in the Commons; and the Serjeant-at-Arms, who is more especially the attendant of the Chancellor.

The privileges of the House are not formulated in any demand for their enjoyment; but as we have seen, the

<sup>1</sup> May, *Parl. Practice*, ed. 11, p. 122. The places assigned by the Act are not in practice occupied as prescribed.

<sup>2</sup> *Ibid.*, ed. 11, p. 189.

privileges of the Commons are not limited to those which the King is asked to recognize. We may now note what are the privileges of the House of Lords, comparing them, where possible, with those of the House of Commons.

Freedom from arrest is claimed by the Lords as well as Freedom of the person ; by the Commons. It is claimed by the Lords when Parliament is sitting or *within the usual times of privilege of Parliament*, except in cases of treason, felony, or refusing to give security for the peace ; and this privilege is held to extend to their servants and followers during session and twenty days before and after.

The privilege of declining to serve as a witness is now waived by the Lords as by the Commons, and that of freedom from jury service is confirmed by Statute.

Freedom of speech in the House of Lords has not come of speech ; into question as often or as definitely as the like privilege in the Commons ; but the attempts of Charles I to prevent the attendance of peers whom he considered to be hostile to himself<sup>1</sup>, and the dismissal from non-political offices during the eighteenth century of peers who acted in opposition to the King's ministers, show that freedom of speech in the Lords has not been wholly unquestioned.

The privilege of freedom of access to the person of the of access ; Sovereign exists for each individual peer, and not, as with the House of Commons, for the House collectively. This right would seem rather to belong to the magnates as hereditary counsellors of the Crown than to the Lords as a House of Parliament<sup>2</sup>.

The right of the House of Lords to see to the due con- of exclu-  
ding dis-  
qualified  
persons ; stitution of its own body is perhaps better considered under the head of the judicial powers of the House, for some of these powers are matters of privilege, and some are not<sup>3</sup>.

No question has been raised, so far as I am aware, of commit-  
ment. concerning the right of the House to regulate and control its own proceedings ; and in comparing the privileges of the

<sup>1</sup> Gardiner, *History of England*, vol. vi. 91, 94.

<sup>2</sup> See vol. ii, *The Crown* (ed. 3), part i, p. 137, and Lord Colchester's *Diary*, iii. 604.

<sup>3</sup> See *post*, p. 234.



two Houses it only remains to consider the right of the House to commit for contempt. The House of Lords possesses wider powers in this respect than does the House of Commons<sup>1</sup>; it can commit for a definite term, and the prisoner is not released by prorogation. If however the commitment is not for a specific term, prorogation does, as it would seem, end the commitment<sup>2</sup>, although Lord Denman in *Stockdale v. Hansard*<sup>3</sup> seems to have considered this to be doubtful.

#### Proxies.

A privilege which the House has thought it right to forego since 1868 is that of voting on divisions by proxy. The origin of the practice was doubtless due to the desire of the King in the early days of Parliaments to secure that the members of the baronage were individually bound by the grants made or the laws agreed to in their House. 'Those lords,' says Elsynge<sup>4</sup>, 'that could not appear according to their summons made their *proxies*. But if they neither came nor made proxies, then for their disobedience to the King's writ they were amerced.' There were occasions when the King was not satisfied with an appearance by proxy, and on such occasions the writ contained a clause to the effect that a proxy would not be admitted<sup>5</sup>.

The practice shows that a peerage involved liabilities as well as rights, and that the attendance of the peer in Parliament might at any time be insisted upon by the King.

The rules which the House adopted for the regulation of voting by proxy are now immaterial, for a standing order was made on March 31, 1868, that 'the practice of calling for proxies on a division shall be discontinued.'

#### Protests.

The right of a dissentient peer to record a protest on the Journals of the House is not a privilege except in so far as the control of its own procedure by the House is a privilege. The House of Commons might by standing order confer the same right upon its members. But a minority in the

<sup>1</sup> *R. v. Flower*, 8 Durnf. & East, 314.

<sup>2</sup> May's Parliamentary Practice (ed. 11), p. 91.

<sup>3</sup> 9 A. & E. 127.

<sup>4</sup> Manner of holding Parliaments in England, p. 119.

<sup>5</sup> Report on Dignity of a Peer, Appendix I, Part ii. p. 408, and see Pike, Const. Hist. of House of Lords, pp. 243-245.

House of Commons is content with the power of speaking in a debate and voting in a division. In the House of Lords a minority, or any part of one, enjoys a further opportunity for the expression of its views, and can enter the grounds of its dissent in the form of a protest upon the Journals of the House.

The privileges of the House bring us into contact with its judicial functions, and we must distinguish the functions of this nature which concern privilege from those which do not. The appellate jurisdiction of the House rests now upon the Appellate Jurisdiction Act, 1876. This Act confirmed, defined and regulated the exercise by the House of the jurisdiction which it previously enjoyed as a court of error or appeal from English, Scotch and Irish Courts. Judicial duties.  
Appellate.

But neither the duties of the House as a court of final appeal nor its duty to try great offenders against the state, when impeached at its bar by the Commons, can be regarded as a privilege of the House. Impeachment.

The jurisdiction which is concerned with privilege is of two kinds, that which enforces the right of a peer to be tried by his peers, and that which enforces the right of the House to see to the due constitution of its body.

The first of these rights entitles a peer indicted for treason, or felony, or misprision of either, to be tried by his peers. Trial of peers : This privilege is extended to Scotch and Irish peers by the Acts of Union and to peeresses by 20 Hen. VI, c. 6.

The indictment is found in the ordinary course and the case removed by *certiorari* to the Court in which the peer claiming privilege is to be tried. This, if Parliament is sitting, is 'before the King in Parliament,' if out of session, it is the Court of the Lord High Steward. All peers are entitled to attend, and the difference between the two Courts is to be found in the position of the Lord High Steward, who is appointed for each case, as it may arise, by the Crown. If the trial takes place in Parliament, the Lord High Steward is merely the president of the Court, the peers are, equally with their president, judges of law and before King in Parliament.  
In Court of Lord High Steward.

fact. In the Court of the Lord High Steward he determines all points of law, the peers are only judges of fact<sup>1</sup>.

Right to  
exclude  
disquali-  
fied  
persons

The privilege which the House of Lords enjoys in respect of the constitution of its own body is analogous to the right which the House of Commons exercises, when it prevents a disqualified person from taking part in its proceedings and declares the seat vacant for which such a person has been chosen.

In the debate on the *Wensleydale* peerage case Lord Campbell describes the nature of this right.

‘We have no right to consider the merits or demerits of the party who claims to take his seat here, if he be a British subject free from legal disability; but we have a right to see that he shows a title to sit here *ex facie* good: and if he claims by patent the validity of that patent is necessarily submitted to our jurisdiction. We may call in the judges as advisers, but the House decides *proprio vigore*. Like all other deliberative assemblies, we are necessarily vested with the power of preventing intruders from interfering with our deliberations.’ He insists on the distinction between ‘two things which are entirely dissimilar—deciding upon claims to an old peerage, and considering the validity of a new creation.’

in case  
of new  
creation.

It was in the exercise of this right to determine the validity of a new creation that the House decided in 1711 that the acquisition of an English peerage did not entitle a Scotch peer to a seat<sup>2</sup>. This decision was reversed in 1782 by the House, after taking the opinion of the judges. But the same right was exercised again, in 1856, in the case of Lord Wensleydale, the validity of whose patent was questioned and, in the end, negatived.

Right to  
insist on  
summons  
of quali-  
fied  
persons.

The converse of the right to exclude one who endeavours to take his seat with an invalid title is the right to insist that persons fully entitled are summoned and allowed to sit. In 1626 the peers petitioned Charles I to send to the

<sup>1</sup> In vol. ii, Part ii, p. 274, by a slip it is stated that the trial out of session is ‘before the King in Parliament.’ See for a full account of this privilege, Palmer, *Peerage Law in England*, pp. 146-9.

<sup>2</sup> *Supra*, p. 269.

Earl of Bristol the writ of summons which was wrongfully withheld from him<sup>1</sup>; and in the same year they compelled the King to release the Earl of Arundel who was detained in custody on no such charge as took his case out of the limits of privilege. The House met the numerous evasions of Charles by adjourning all other business to the consideration of their privileges, and the King thereupon set the Earl free<sup>2</sup>.

In the case of claims to old peerages, the House has no right save such as the Crown confers by reference. The claimant petitions the Crown for a writ of summons; his petition is referred to the Attorney-General, who examines and reports upon it. If his report is favourable the claim may be at once admitted, and the writ issued; if there is any doubt the King refers the petition and report to the House of Lords. The House appoints a Committee of Privileges to inquire further, and the claimant must establish his case to the satisfaction of the Committee, whose resolutions are communicated by the House to the King.

Reference from Crown where old peerage in dispute.

It should be noted that whereas the decisions of the House of Lords, sitting as a Court of Final Appeal, are considered to be binding upon itself, and can only be reversed by legislation, the resolutions of one Committee do not bind a subsequent Committee. And this applies alike to decisions on the rights of newly created peers, and on the claims to old peerages.

Committee not bound by previous decisions.

Thus the House reversed in 1782 the decision arrived at in 1711, that an English peerage granted to a Scotch peer did not entitle him to sit and vote; and in the *Wiltes* case reversed its decision in the *Devon* case, that the Crown can create a peerage descendible in a manner unknown in the descent of an estate of freehold<sup>3</sup>.

The House has, however, a statutory right, under the Act of Union, to decide all questions of the validity of Irish peerages; and a similar right by 10 & 11 Vict. c. 52 in the case of all claims to Scotch peerages, in respect of

<sup>1</sup> Gardiner, *Hist. of England*, vi. 94.

<sup>2</sup> *Ibid.* 114, 115; and *Elsynge on Parliaments*, 224 et seq.

<sup>3</sup> Per Lord Chelmsford in the *Wiltes* peerage case, L. R. 4 H. L., p. 148.

which no vote has been exercised since 1800, and in all cases in which a claim to vote has been made matter of protest by two peers whose rights are unquestioned.

The part played by the House of Lords in the practical working of the Constitution is hardly a matter for this book. Yet one may note the curious historical transformation whereby the estate of the baronage has, by the continuous exercise of the royal prerogative in the creation of peers, developed into a second chamber containing a fair representation of the general interests of the community, and in many respects admirably fitted to maintain a high level of political discussion.

The place and purpose of a second chamber, constituted on the lines of our House of Lords, have been dealt with by modern writers on the English constitution; by no one with more force and vividness of description than by Mr. Bagehot. But since he wrote, in 1868, the situation is changed in many respects. Extension of the franchise has given political power to the working classes; the institution of single-member constituencies has tended to produce, throughout the two political parties, uniformity of type, and that the type which represents the more extreme opinions professed by either party. The House of Commons is therefore further apart from the House of Lords than it was in 1868. But the House of Lords has also changed. Its numbers have increased from 426 in 1868 to 592 in 1908, and this increase of numbers is not accompanied by any corresponding increase among the working members of the House. The son of a man who has been raised to the peerage for eminence in political or professional life, in the public service, or in business, has not necessarily the aptitude for public life, or interest in public affairs which would make him an active member of a legislative chamber, while his position inclines him to be content with things as they are. The House of Lords then is open to criticism on the ground that many of its members take little or no part in its business; that there is a large permanent majority on the Conservative benches, and that the House itself

tends to be more and more estranged from a House of Commons elected on a democratic franchise.

The reform of the House of Lords is not a topic on which Reform. to deal at length, but schemes of reform set forth recently, and with authority, cannot be passed over.

In 1907 a Committee of the House of Lords was appointed to consider suggestions for increasing the efficiency of the House, and reported in 1908. Committee of 1907:

They recommended :—

(1) That with the exception of peers of the blood-royal a hereditary peerage should give no right to a writ of summons as a Lord of Parliament. its proposals,

(2) That a right to a writ of summons might accrue

(a) to hereditary peers *qualified* by the tenure of high office in the political or permanent civil service, of high rank in the Army, the Navy or the diplomatic service, or of judicial or legal office, or by service for a specified number of years in the House of Commons. qualified hereditary peers,

(b) to hereditary peers *representative* of and chosen by the hereditary peers including those of Scotland and Ireland: the number of such representative peers was to be 200, and they were to be chosen by cumulative vote, to serve for a Parliament. representative hereditary peers,

(c) to spiritual peers, to the number of 10, two of whom should be the Archbishops of Canterbury and York, while the remaining 8 were to be chosen by the entire body of Bishops including those who were not as yet entitled to a summons. spiritual peers,

(d) to *nominated* life peers, to the total number of 40, to be created by the Crown, not more than four in any one year, three of whom must possess such a qualification as would entitle a hereditary peer to a seat. nominated life peers.

It was calculated that, with the Lord Chancellor and the Lords of Appeal, the House of Lords thus constituted would consist of 380 to 400 persons.

The report of this Committee is now a matter of historical interest; for the reform of the House of Lords became a practical question when the limitation of its powers by

Preamble  
of Par-  
liament  
Act.

the Parliament Bill came before the House in the autumn of 1910. The Preamble of the Bill of that year, like the Preamble of the Act of 1911, announces that it is intended 'to substitute for the House of Lords as it at present exists a Second Chamber constituted on a popular instead of hereditary basis, but such substitution cannot immediately be brought into operation.'

The House of Lords in November 1910 passed resolutions to the effect that hereditary right should not of itself constitute a claim to a writ of summons, and that it was desirable to introduce elements from outside the hereditary peerage into the composition of the House.

Lord  
Lans-  
downe's  
re-consti-  
tution  
Bill.  
heredi-  
tary,

In May 1911 Lord Lansdowne introduced a measure for the re-constitution of the House of Lords. Under the scheme embodied in this measure the Second Chamber would contain five descriptions of members.

elected,

100 elected by the hereditary peers from among hereditary peers possessing official or administrative qualifications set forth in a schedule to the Bill, and chosen in such a manner as to secure the representation of minorities.

nomi-  
nated,

120 representing electoral districts to be formed by Commissioners, and chosen by the members of the House of Commons representing the Parliamentary constituencies within those districts.

official  
members.

100 nominated by ministers in proportion to the strength of parties in the House of Commons, and appointed by the King.

7 Spiritual Lords, the two archbishops and five bishops chosen by the archbishops and bishops.

16 who have held high judicial office.

The elected and nominated members were to retain their seats, when the scheme had come fully into operation, for a period of twelve years, one-fourth of the number retiring every three years. No peer was to be disqualified from sitting in the House of Commons unless he had a seat in the Second Chamber; and a limitation was proposed to be placed on the prerogative of the Crown in conferring the dignity of a peer. Not more than five such creations were to take place in any one year.

It was contended that a Second Chamber thus constituted

would be of convenient size, would be dignified, efficient and fairly representative of the political parties in the State.

Lord Lansdowne's Bill did not go beyond the stage of a second reading, and the promise of a reformed Second Chamber held out in the preamble to the Parliament Act remains unfulfilled.

The House of Lords retains its constitution unchanged, but its powers are limited to revision, and two years' delay, except in the case of Bills which the Speaker may hold to be Money Bills, and here the period of delay is reduced to one month.

Herein we have departed from a principle which has been regarded as vital by the great democracies of modern times. They have been at pains to create second chambers, and not only to invest them with powers of correction, revision, and rejection of measures passed by the more popular assembly, but to use them as a security against hurried constitutional change, and in some cases to make arrangements for the settlement of differences of opinion between the two Houses should these lead to serious dispute.

Any student of the constitution of the United States, of the French Republic, of the Australian Commonwealth, of the South African Union, will see that no great democracy is willing to entrust its political fortunes to the will of one popularly elected assembly. The construction of a second chamber is always a difficult task; and a second chamber based on hereditary right is no doubt repugnant to many political thinkers. There are many chances against its serving its purpose well, but the practical question for us is whether in fact it does help to carry out the wishes of the people.

It may be questioned whether, since 1832, the House of Lords has ever resisted the will of the people, definitely expressed; and it has afforded the security for an appeal to the people against ill-considered, undesired, or violent change.

That security has now been abandoned by the provisions of the Parliament Act; but since the preamble of that Act promises not only a new Second Chamber, but a new definition of the powers of the Second Chamber, we must await the further development of constitutional change.



## CHAPTER VI

### THE PROCESS OF LEGISLATION

WE have now brought our Parliament together, have analysed its constituent parts, and have ascertained how they come into existence, and of what they consist. The next step must be to consider how they act.

Legisla-  
tive  
functions  
of Parlia-  
ment most  
striking  
because  
here Par-  
liament is  
sovereign.

The most prominent if not the most important function of Parliament is legislation. Parliament, it is true, discharges other and serious duties in the discussion and criticism of the action of Ministers. In this respect the House of Commons represents, or should represent, in concentrated form, the public opinion of the country. It may be said, roughly, to represent public opinion as expressed at the previous general election. This function of Parliament is discharged in various ways which may be more properly dealt with in a later chapter; but the control which it can thus exercise over affairs is, at best, indirect; in making laws its control over conduct is direct and absolute. The sovereignty of Parliament is displayed in legislation.

Limita-  
tions on  
its sove-  
reignty.

Legislative sovereignty is subject to the reservations which Mr. Dicey<sup>1</sup> has shown to exist in respect of all sovereignty, however absolute. The omnipotence of Parliament is dependent on a certain correspondence between legislation and public opinion, a correspondence which must be more or less close in proportion to the tractability, the political capacity, the organization of the governed. The law-maker in a despotism must consider first whether his law will cause a revolt; and next whether he has force at his back to crush it. The law-maker, in a state where the bulk of the population elects those who make the laws,

<sup>1</sup> Law of the Constitution, p. 71 sq.

has to consider whether the majority will approve, or at any rate will accept his law. Usually, in civilized states, a law is obeyed, even by those who disapprove of it, until opportunity for change offers itself: and therefore, given a certain correspondence with public opinion, Parliament is omnipotent. From it there is no appeal save to the electorate, and that appeal can only be made by the Crown and at the instance of the ministers of the Crown. It is the business of the executive and of the Courts to give effect to the enactments of the legislature.

The exercise of this supreme legislative power, the outward and visible sign of sovereignty, is the form of Parliamentary action which we must now consider. We can examine later the duties of Parliament as a grand Court for national grievances, and as the critic of the executive.

I propose, in dealing with the process of legislation in Parliament, to divide the subject into six heads, as follows:—

Division  
of subject.

1. History of legislative procedure.
2. Ordinary procedure of the House of Commons.  
Public Bills.
3. Money Bills.
4. Procedure of the House of Lords. Relations of the Houses.
5. Private Bill Legislation.
6. Provisional and other Statutory Rules and Orders.

## SECTION I

### HISTORY OF LEGISLATIVE PROCEDURE

#### § 1. *The Rights of the Commons.*

In considering how at different times laws have been framed and passed, we need not regard the forms in which the charters and assizes of the Norman and Angevin kings were issued. Magna Charta is, in form, a charter of liberties, in substance, a treaty between King and people,

Legisla-  
tion before  
Parlia-  
ment  
existed.

though it is issued *per consilium venerabilium patrum, et nobilium virorum*. Other enactments of kings, though made before the representation of the counties and boroughs in the Commons, are made by the advice and with the assent of the national council. Whatever may have been the respective shares of the King and his counsellors, legislation proceeded from the King with the counsel and consent of a body of advisers variously constituted from time to time.

1297. But we are concerned only with legislation by the Crown in Parliament; and the steps by which the Commons became partakers in this counsel and consent, and established thereby the legislative sovereignty of Parliament. The Confirmatio Cartarum is a solemn affirmation of the right of the Commons to be parties to taxation: an Act of the fifteenth year of the reign of Edward II is a like affirmation of their right to be parties to legislation.

The Confirmatio Cartarum runs thus:—

Rights of  
the Com-  
mons in  
respect of  
taxation :

‘v. And for so much as divers people of our realm are in fear that the aids and tasks which they have given to us before time towards our wars and other business, of their own grant and goodwill, howsoever they were made, might turn to a bondage to them and their heirs, because they might be at another time found in the rolls, and so likewise the prises taken throughout the realm by our ministers: we have granted for us and our heirs, that we shall not draw such aids, tasks nor prises into a custom, for anything that hath been done heretofore, or that may be found by roll in any other manner.

‘vi. Moreover we have granted for us and our heirs, as well to archbishops, bishops, abbots, priors and other folk of holy Church, as also to earls, barons and to all the commonalty of the land, *that for no business henceforth will we take such manner of aids, tasks nor prises, but by the common assent of the realm, and for the common profit thereof, saving the ancient aids and prises due and accustomed.*

of legisla-  
tion.

And the Act of 1322 is even more explicit on the legislative rights of the Commons:—

‘The matters which are to be established for the estate of our lord the King and of his heirs, and for the estate of the

realm and of the people, shall be treated, accorded and established in parliaments by our lord the King, *and by the assent of the prelates, earls and barons and the commonalty of the realm*, according as hath been heretofore accustomed.' 15 Edw. II.

But though the participation of the commonalty of the realm was thus early declared to be essential to the validity of taxation and of legislation, yet as a matter of practice it was a long time before the process of legislation assumed its present form. Two causes tended to produce this delay.

Difficulties in the exercise of these rights.

The Crown in Council possessed and exercised a concurrent legislative power, inconsistent with the provision of the Statute of Edward II that Crown, Lords and Commons should participate in all legislative acts. And again, the procedure through which the Commons at first exercised their right to partake in legislative functions did not secure that they obtained their due share in the framing of the required laws.

### § 2. *The claims of the Crown to legislate.*

The concurrent legislative power of the Crown in Council was a survival of the pre-Parliamentary Constitution, and is manifested in the distinction, so difficult to be drawn by the student of constitutional history, between Statute and Ordinance.

Statute and Ordinance :

The recognized differences between these two modes of legislation are described by Dr. Stubbs as being differences partly of form, partly of character<sup>1</sup>. The *Ordinance* is put forth in letters patent or charter and is not engrossed on the Statute Roll; it is an act of the King or of the King in council; it is temporary, and is revocable by the King or the King in council. The *Statute* is the act of the Crown, Lords and Commons; it is engrossed on the Statute Roll; it is meant to be a permanent addition to the law of the land; it can only be revoked by the same body that made it and in the same form.

how distinguishable.

<sup>1</sup> Const. Hist. ii. 584.

The Ordinance in fact seems to follow the form of legislation which was in use when the Crown in Council discharged both legislative and executive functions. Its existence indicates the difficulty, which is noticeable for some time after Parliaments were at work, in distinguishing the functions of the Crown in Parliament from those of the Crown in Council, and of the 'Magnates' as Councillors of the Crown from the same persons as Lords of Parliament.

Illustration.

The difference between Statute and Ordinance is well illustrated by the proceedings of the year 1340. The petitions of that year were considered in two groups. One of these was ordered to be dealt with by a joint Committee<sup>1</sup> of the two Houses and related to such articles as were intended to be perpetual. These were 'by the common assent and accord of all' to be put into a Statute, '*lequel Estatut nostre Seignur le Roi, par assent des touz en dit Parlement esteantz, comanda d'engrosser et ensealer, et fermement garder par tut le Roialme d'Engleterre: et lequel estatut commence "A l'honneur de Dieu &cet."*'

The other group related to 'such points and articles as were not perpetual but for a time,' and with these '*nostre Seignur le Roi, par assent des Grantz et Communes, fait faire et ensealer ses Lettres Patentes qui commencent en ceste manere, "Edward &cet. Sachetz que come Prelatz Countes &cet."*'

Ordaining power of Crown questioned by Commons.

As the relative positions and duties of Crown and Parliament grew more definite, Crown and Commons alike realized the importance of this independent exercise of legislative power by the Crown in Council. The confusion

<sup>1</sup> The Committee consisted of prelates, temporal peers and judges, twelve knights of the shire, and six burgesses. Rot. Parl. ii. 113.

<sup>2</sup> Rot. Parl. ii. 113. The Statute, 14 Edw. iii. st. 1, runs thus:—

'To the Honour of God and of Holy Church, by the assent of the Prelates, Earls, Barons, and others assembled at the Parliament holden at Westminster, the Wednesday next after Mid-lent in the 14th year of the reign of our Lord King Edward the Third of England and the first year of his reign of France: the King for the peace and quietness of his people, as well great as small, doth grant and establish the things underwritten, which he will to be holden and kept in all points *perpetually to endure.*'

<sup>3</sup> Rot. Parl. ii. 113.

is gradually cleared away in the time of Edward III. During that reign various experiments were tried for raising money at councils to which a limited number of knights and burgesses were summoned. Thus in 1353 an assembly of this sort sanctioned the Ordinance of the Staple<sup>1</sup>, whereby trade was regulated, a new capital offence created, and a source of supply secured to the Crown. But the Commons present at this council protested against the enactment of matter so grave, unless in Parliament and in statutory form, and petitioned that the ordinances so made 'should not be of record as though they had been made by a general Parliament.' The King thereupon promised that steps should be taken to publish the Ordinances of the Staple and that in the next Parliament they should be rehearsed and put on the Roll of Parliament. Next year a Parliament, duly constituted, confirmed the Ordinances 'to be held for a Statute to endure always' and provided against further dealing with the matter save by consent of Parliament<sup>2</sup>.

Illustration.

As the distinction between Statute and Ordinance became manifest, the Crown came to assert definitely as a part of the prerogative the right to legislate independently of Parliament. The Royal Proclamations of the sixteenth and seventeenth centuries form the battleground of the old controversy which is fought under changed names, and the right of the Crown to tax or to legislate without Parliamentary sanction is asserted and disputed in one form or another from the Ordinance of the Staple to the Bill of Rights.

A source of conflict in 17th century.

### § 3. *The share of the Crown in framing Laws.*

The difficulties which arose from the mode of procedure in framing and passing laws were of a different kind. At the Statutes drafted by Crown on petition of Estates.

<sup>1</sup> The staple was a system for the regulation of markets in certain towns, where goods were brought for sale and sold, after trial of their quality, to merchants who had a monopoly in dealing with such goods. The market and the monopoly were alike matters of royal grant, and were granted in return for contribution to royal revenue. Stubbs, Const. Hist. ii. 411.

<sup>2</sup> Rot. Parl. ii. 253, 257.

the outset of our Parliamentary history statutes were drafted and enacted by the Crown in Council on the petition of the estates of the realm, and the first questions arose upon the necessity for the assent of all to the petitions of each.

Was it  
requisite  
that all  
estates  
should  
concur?

The procedure of early Parliaments is obscure, and for our purposes not very important. The date at which Lords and Commons first held separate sessions is uncertain, if indeed it is certain that they ever sat together. The fact that the baronage, the clergy, the knights, and the burgesses voted money in different proportions suggests, not two sessions, but four. At any rate, by the year 1341<sup>1</sup> the clergy had ceased to attend, and the Lords and Commons sat apart. But the necessity for a concurrence in legislation of the two estates which constituted Parliament does not seem to have been recognized for some time after the Statute of Edward II had ostensibly secured the legislative rights of the Commons.

Apart from the Statute *Quia Emptores* passed *instantia magnatum*, which belongs to an earlier date, we may accept in proof the statement of Dr. Stubbs that 'although in 1340, 1344, and 1352 the statutes passed at the petition of the clergy received the assent of the Commons, it seems almost certain that from time to time statutes or ordinances were passed by the King at their request without such assent<sup>2</sup>'.

The abstention of the clergy, as an estate, from Parliament settled any question that might have arisen as to the need of their assent to petitions of the Lords or Commons, and throughout the fourteenth century the Commons adopted and merged the separate petitions of the 'magnates' in their own, even in matters such as the trial of peers, which exclusively concerned the Upper House.

Double  
capacity of  
peers.

The twofold duties of the peers as an estate of the realm and as councillors of the Crown make it difficult throughout the fourteenth century to discover how far their concurrence in the petitions of the Commons was needful to

<sup>1</sup> If Haxey was a clerical proctor as suggested by Dr. Stubbs, the clergy attended in 1397 (*supra*, p. 157): but the matter is doubtful. Stubbs, *Const. Hist.* ii. 516 n.

<sup>2</sup> Stubbs, *Const. Hist.* ii. 595.

secure the assent of the Crown. For the King might be moved to reject a petition either because the Lords did not concur in it, sitting as a House of Parliament, or because they advised him to refuse it in their capacity of councillors of the Crown. But we may assume that with the recognition of the distinction between Statute and Ordinance the need of concurrence of Lords and Commons in legislation was also recognized.

Setting aside therefore these questions of initiation and concurrence, we may pass to the ordinary mode of legislation. This was by statute made on petition of the Commons. The King summoned a Parliament, partly for advice, mainly for supply. Having stated his need of a grant of money, the Commons stated their needs in the matter of legislation. Grievances came before supply, and the grant of money might perhaps depend upon the answers received by the Commons to their petitions. Hence the ordinary form of words intended to imply rejection was constructed so as to seem to mean merely a postponement. A favourable answer was couched in the words, *le roy le veult*, an unfavourable answer in the words, *le roy s'avisera*.

Ordinary  
process of  
mediaeval  
legisla-  
tion.

Petition.

Answer.

But an affirmative answer to their petition did not necessarily give to the Commons what they wanted in the way of legislation. The King, with the assistance of his council, might frame a law in accordance with the terms of the petition, and then this law would be engrossed in the Statute Book; or perhaps the matter was of temporary importance and then it would be regulated by ordinance in letters patent. But the wishes of the Commons were apt to be defeated in various ways even though their petitions had received the royal assent. Sometimes the matter was forgotten, or intentionally laid aside after Parliament had broken up, and then no law was made. Sometimes a law was made, but not in accordance with the terms of the petition. Sometimes the law was made in a satisfactory form, but accompanied with saving clauses which enabled the King to suspend it for a time, or dispense with its operation in certain cases.

Imperfect  
security  
for effective  
legisla-  
tion.

The Commons, before they realized the importance of



Attempts  
to obtain  
it.

drafting bills as they wished them to pass, attempted in many ways to secure that their petitions, when answered in the affirmative, should be made into statutes in the form and to the intent required, and free from the possibility of suspension or revocation.

1327.

1341.

They asked to have the answers of the King set forth in writing and sealed, so that they might be assured of a correspondence between answer and petition. They annexed conditions to the grant of supply to the effect that the petitions exhibited by Lords and Commons should be affirmed in the form in which they had received the King's assent. Their efforts were largely directed to procuring the due enactment in Statute or Ordinance of such provisions as were intended to be respectively permanent or temporary, and one may suspect from the tenour of the frequent petitions of the Commons that the King was apt to employ the revocable form of Ordinance where the Commons desired the permanent form of Statute, and to issue charters or letters patent instead of entering the required provisions on the Statute Roll.

A great step was made when in 1414 the Commons demanded of Henry V that they should be 'as well Assentirs as Peticioners' and that their petitions should not be altered when put into form of law without their consent. They received for answer that:

'the Kyng of his grace especial graunteth that from hensforth no thing be enacted to the peticions of his Comune that be contrarie of hir asking wharby they shuld be bounde withoute their assent. Savyng alwey to our liege lord his royal prerogative to graunte and denye what him lust of their petitions and askynges aforesaide.'

The growing influence of the Commons in legislation is marked by the changes in the form of the enacting clause of statutes.

Forms of  
enact-  
ment.

The Statute of Westminster i. is thus described as 'Establisementz le Rey Edward fez par son conseil e par le assentement des Erceveskes, Eveskes, Abbes, Priurs, Contes,

<sup>1</sup> Rot. Parl. iv. 22.

Barons, et la Communauté de la terre illeokes somons<sup>1</sup>. From the year 1318 statutes are expressed to be made by the assent of the prelates, earls, barons, and the commonalty of the realm; but from the commencement of the reign of Edward III the mode of legislation upon petition finds expression in the words 'at the request of the Commons.' Sometimes both Houses are described as petitioners, as in the form 'Le roy supplie feust par les Prelats, Countes, Barons, et les communaltez.'

In the 11th of Henry VI the words 'by authority of Parliament' come in, thereby placing the Houses upon a level in legislative power; and a little before that date the 'request' of the Commons begins to drop out. The enacting clauses are not uniform, but gradually throughout the reign of Henry VI statutes ceased to be enacted by the *request* of the Commons and are enacted by the *authority* of Parliament, and from the 1st of Henry VII the *request* is never revived.

#### § 4. *Billa formam actus in se continens.*

But the substantial remedy for the difficulty which I have described was found when, as took place in the reign of Henry VI, the Commons adopted the practice of framing their petitions in statutory form, and requested that the form should not be altered. Dr. Stubbs tells us that this custom was introduced 'first in the legislative acts which were originated by the King<sup>2</sup>'; an early instance of its adoption by the Commons is to be found in the Parliament Rolls of 1429, when they ask that 'the Bille which is passed by the Communes of yis present Parliament; hit lyke unto ye king by yadvys of the Lordys Spirituell and Temporell in yis present Parlement, yat graciously hit may be answered after the tenure and fourme yerof<sup>3</sup>.'

There is a further indication of the change in the not unfrequent use of the expression, 'billa formam actus in

<sup>1</sup> Stubbs, Documents, &c., 450.

<sup>2</sup> Const. Hist. iii. 463.

<sup>3</sup> Rot. Parl. iv. 359.

se continens<sup>1</sup>: meaning that the 'bill,' which in Parliament, as in the Chancery, was the usual vehicle for a petition, did not contain a petition only, but the scheme or draft of a statute.

Effect  
of this  
change.

And the process of legislation by bill presented for the acceptance or rejection of the Crown did much more than help to formulate Parliamentary procedure, or to secure the due effect of the royal assent to a petition. It established the distinction between Executive and Legislature, the Crown in Council and the Crown in Parliament.

Increas-  
ing power  
of Parlia-  
ment.

For until this mode of legislation came into practice, the Houses had petitioned the Crown for the redress of public grievances, just as the suitor petitioned the Crown in Chancery for the redress of a private and individual grievance. These petitions were presented before the grant of supply, and the words, still in use, by which the King expressed his assent or dissent, were so framed as not to imperil the grant if he disapproved of the proposed legislation. But this meant that the legislative act came from the Crown, and though Lords and Commons might complain of legislation which was not initiated or embodied in their petitions, yet all laws were left to the Crown to make, and depended for form and time of making upon the pleasure of the Crown.

The  
Houses  
frame the  
laws.

But when the Houses of Parliament took into their own hands the drafting of Statutes, their demands for legislation became definite and urgent; the laws which they desired to see made could not be varied, though they might be nullified or postponed. They no longer asked the King to assent to the making of a law on a given subject, and then to make one, but they asked him to say 'yes' or 'no' to the passing of a law drawn in the form in which they wished it to pass, and no longer admitting of amendment.

The King  
assents or  
dissents.

Henceforward if the Crown took independent legislative action, such action was unwarranted by law or by custom. For Statute, as we have seen, made the two Houses necessary parties to legislation, and the form which legislative

<sup>1</sup> The phrase perhaps survives in the modern heading of a bill sent from one or other House 'A bill intituled an Act.'

procedure had now assumed reduced the share of the King to a formal assent or dissent. If the King chose to legislate independently of Parliament it could no longer be alleged that he was merely carrying out what he believed to be the purpose of a petition in the customary form.

§ 5. *Commencement of modern procedure.*

When an intended statute was no longer suggested to the King in the shape of a petition for legislation, but was presented in the terms in which the Houses desired to place it on the Statute Book, a fuller discussion and more precise rules of procedure became necessary.

There is a gap in our sources of information between the close of the *Rotuli Parliamentorum* and the commencement of the Lords' Journals with the reign of Henry VIII and of the Commons' Journals with that of Edward VI. But as soon as the Journals begin we find the three readings in each House; and in Elizabeth's reign the Committee stage after a second reading becomes a regular practice. But the Committee to which a Bill was referred was what we should now call a Select Committee, a few members chosen to consider the Bill and report upon it. Thus in 1571 the Bill to relieve burgesses from residence in their constituencies was referred to a Committee of nine, who were instructed to meet on the following Friday at the Temple Church. In the next reign Committees were larger, but what is described in the Journals as a 'General Committee' was not a Committee of the whole House. It was, at least in some cases, a Committee open to the whole House, but those who attended without having been placed on the Committee had no votes. Nor were any placed on the Committee who had previously spoken against the Bill<sup>1</sup>. Early in the reign of Charles I the practice of referring Bills to Committees of the whole House<sup>2</sup> came into use, and from that time onwards procedure has varied little until very recent times. The second reading of a Bill had

Course of  
a Bill in  
Commons.

Three  
readings.

Com-  
mittee  
stage.

Com-  
mittee of  
whole  
House.

<sup>1</sup> Hakewill, *Modus Tenendi Parliamentum*, p. 146.

<sup>2</sup> 'All that will come to have voice.' *Com. Journ.* ii. 877.

Select  
Com-  
mittee.

been followed as a general rule by its reference to a Committee of the whole House, less commonly to a Select Committee whose consideration of the Bill was not a substitute for the subsequent discussion in Committee of the House.

Standing  
Com-  
mittees.

In 1882 two Standing Committees were introduced for Law and Trade, intended for the discussion of such measures of legal or commercial change as were uncontentious in character though needing careful scrutiny in detail. As time went on measures were referred to these Committees which were neither uncontroversial, nor specially concerned with Law or Trade, and in 1907 reference to a Standing Committee became the rule except in the case of money bills and provisional order bills. Unless the House otherwise order, a Bill now goes as of course to one of the four Standing Committees, to be constituted under the Order of 1907<sup>1</sup>.

Object of  
procedure.

The history of Parliamentary Procedure has been well told elsewhere<sup>2</sup>. Here it is enough to indicate some of the features which mark its progress.

Until the commencement of the nineteenth century the rules of the House of Commons were constructed with two objects in view. One was to protect the House from hurried and undiscussed action pressed forward by the King's ministers. The other was to secure fair play between the parties in the House and a hearing for all.

Fear of  
royal  
influence.

We must recollect that until the eighteenth century was fairly well advanced the Speaker was a nominee and a minister of the Crown, and that the use of Committees of the whole House in the seventeenth century is not unconnected with the desire to transact business under the chairmanship of an independent member.

The Leader of the House might be even more at the service of the Crown than the Speaker; and this not merely in the sense that every minister is the King's servant, but as using his position to give effect to the

<sup>1</sup> *Infra*, p. 260.

<sup>2</sup> For an exhaustive treatment of this subject I must refer the reader to Dr. Redlich's *History of Parliamentary Procedure in England*.

personal wishes of the King. When Henry Fox accepted that position in order to carry the Peace of Paris he thus explains the situation. 'His Majesty was in great concern lest a good peace in a good House of Commons should be lost and his authority disgraced, for want of a proper person to support his honest measures. . . . In short I am a Cabinet Councillor, and *His Majesty's Minister in the House of Commons*<sup>1</sup>.'

The House therefore did well to secure every opportunity for discussing matters the discussion of which might be unwelcome to the King and his ministers, and the Orders of the House were more calculated to promote freedom of speech than the transaction of business. It was not until 1811 that the Government obtained precedence for their business on certain days. The history of our procedure since that time is a record of successive reductions of the time during which private members may introduce the discussion of matters outside the range of Government business, of successive limitations of opportunity for raising general questions at the various stages of Government business, and at last of the time allowed for discussing at all the matters which a Government desires to carry through the House.

Apart from organized obstruction, which began rather more than thirty years ago, there is no doubt that the subjects proper for discussion have enormously increased in number and that at the same time the number of members who desire to discuss and are capable of discussing these subjects has also very largely increased, while the number of hours in the day, and the general conditions and external interests of life, remain the same.

The remedies do not seem to be more than three in number: to reduce the subjects for discussion by some process of delegation; to reduce the length of discussion by a time limit upon speeches; to reduce the opportunities for discussion by rules which curtail the occasions on which debate may take place, and the period for which debate may last.

<sup>1</sup> Bedford Correspondence, iii. 134.

The last of these remedies has been applied during the last twenty years by the Government of the day, and with ever-increasing severity. It is unfortunate that a process originally devised to meet organized obstruction should be used as the only method by which the pressure of business can be lightened or relieved. The closure in its different forms must be reserved for discussion at a later stage. I only desire here to indicate the steps by which our legislative procedure has reached its present form.

## SECTION II

### ORDINARY PROCEDURE OF THE HOUSE. PUBLIC BILLS

#### § 1. *The Business of each day.*

A day's  
work.

To understand the course of a Public Bill on its way to become law it is well to get some notion of the everyday procedure of the House of Commons.

Business  
of Govern-  
ment and  
private  
members.

It should be premised that when the House gets to the Orders of the Day, Government business, as a rule, takes precedence of private members' business. The exceptions are these. From the meeting of Parliament until Easter, private members occupy the hours from 8.15 p.m. to 11 p.m. on Tuesdays and Wednesdays, and the whole of the short Friday sitting. After Easter Government takes the whole of Tuesday, and after Whitsuntide the whole time of the House, except the third and fourth Fridays after Whit Sunday.

Let us now take the events of an ordinary day in the House of Commons.

Prayers.

At 2.45 p.m. on the first four days in the week, the Speaker, accompanied by the Chaplain, preceded by the Serjeant-at-Arms with the mace and followed by his train-bearer, enters the House and advances to the table. Prayers are read: the Speaker then takes the chair and the mace is laid upon the table.

Speaker  
in the  
chair.

The Speaker's chair is at one end of the House, facing the door; in front and below sit the three clerks at the

table. On either side four rows of benches run the length of the House, with a gallery above. Half-way down on each side runs a gangway dividing the rows into two blocks, above and below the gangway.

On the right hand of the Speaker sit the supporters of the Government, ministers occupying the front bench above the gangway. On the left sit the Opposition, and the Independent groups, the Irish and Labour parties. Ex-ministers who are members of the Opposition sit on the front bench opposite to ministers.

Around the House on either side run the lobbies through which members pass for a division, the Aye lobby to the right of the Speaker, the No lobby to his left. There is access to these on either side of the door of the House, and from a door behind the Speaker's chair, and from side doors.

The Speaker having taken the Chair, the business of the day commences, in the following order:—

*Private business* is first dealt with. This means private bill legislation, of which more hereafter. A quarter of an hour is allowed for this, and all business not concluded by 3 p.m. stands over to a time to be fixed by the Chairman of Ways and Means. Private business.

*Questions* come next. These are an important feature of our Parliamentary procedure. They are inquiries addressed to ministers of the Crown, or to members concerned with the business of the House<sup>1</sup>. These questions should not be argumentative but so framed as merely to elicit the information asked for. Supplementary questions arising out of the minister's answer, but not passing beyond the purport of the question, are permitted, but no discussion is allowed, and a minister may, in the interest of the public service, decline to answer a question. Questions.

Notice must be given of all questions by handing them in to the clerk at the table, so that they may appear on the notice papers of the day on which they are asked. If an oral answer is desired the member who hands in his Oral and written answers.

<sup>1</sup> For example, the Chairman of the Kitchen Committee.



question must mark it with an asterisk, otherwise he will receive from the minister a written answer in the course of the day.

Notice as above described may be dispensed with in matters of urgency and importance where private notice is given to the minister concerned, or where the Leader of the House is asked about the course of business.

At 3.45 questions cease, and those which are not reached by that hour are answered in writing by the ministers to whom they are addressed.

The  
Adjourn-  
ment,

*Motions for the adjournment of the House.* Questions become more important as the opportunities of the private member for raising discussion are curtailed, and they may furnish an opportunity for discussion if the minister's answer should bring out matter of new and pressing interest. Such a matter need not necessarily arise out of a question, but in either case it is open to a member at the close of question time to move the adjournment of the House 'for the purpose of discussing a definite matter of urgent public importance.'

how  
moved.

But it does not follow that he will be able to make his motion. The Speaker will first determine whether the matter is definite and urgent, and then the motion must be supported by not less than forty members standing up in their places. If fewer than forty and more than ten stand up, a division may be taken without debate on the question that the motion should be made.

If the member is successful he brings on his discussion on the same day at 8.15 p.m.

Petitions.

*Public Petitions.* These are sent up by localities or bodies of persons to a member for presentation. They deal with some matter of general interest.

I shall have more to say about Petitions in the concluding chapter of this book. Their presentation is now merely formal, and may be effected by putting the petition in a bag which is kept for the purpose behind the Speaker's chair. But if the member pleases he may present the petition publicly, after question time, stating whence it comes, the number of signatories, the material allegations,

and the prayer of the petition. Its subsequent fate must be dealt with later.

*Unopposed returns* are motions for accounts or papers to **Returns**, be laid before the House. If the department concerned raises no objection they come on here.

*Motions for leave of absence.* These were of importance **Leave of absence,** in the sixteenth and seventeenth centuries, when constituencies had little chance of knowing whether their members were discharging their duties, and when members were not entitled to their wages if they went away before the end of the session without a licence from the Speaker. The practice of asking for leave of absence cannot be said to have wholly fallen into disuse, for as lately as May, 1900, a member asked and obtained a week's leave<sup>1</sup>. But attention was called to the fact that many members habitually absented themselves for more than a week, without leave, and absence is now a matter which concerns the Whips and the constituencies rather than the House.

There seems no doubt, however, that non-attendance after leave of absence refused might be treated as a contempt of the House, and refusal to attend a Committee has, in comparatively recent times, been so treated and the offending member placed in the custody of the Serjeant-at-Arms<sup>2</sup>.

Another disused method of enforcing attendance is a *call* **and call of the House.** of the House, disobedience to which without excuse might lead to commitment and such sentence as the House chose to inflict. But there has been no call of the House since 1836, nor motion for a call since 1882.

*Giving notices of motion* comes next in order. Members **Notices of motion.** of the Government can give notice of any motion they propose to bring forward affecting public business, but private members must ballot for priority, and this takes place before the House enters on the business of the day. The rules affecting this matter are too technical to be

<sup>1</sup> Hansard, 4th Series, vol. lxxii, p. 1231.

<sup>2</sup> Case of Mr. Smith O'Brien. Hansard, 3rd Series, vol. lxxv, p. 1291; and see the case of Mr. J. P. Hennessy. Hansard, 3rd Series, vol. clvi, pp. 1931, 2213.

† ANSON PARLIAMENT

S

discussed here: it is enough to say that it is in this manner that the time allowed to private members is allocated among them.

Before entering on the orders of the day motions for the appointment of Select Committees and for leave to bring in bills may be set down for consideration.

Modes of  
introducing a  
Bill :  
formal,

A Bill may be introduced in any one of three ways—

(a) A member may present it at the table after notice but without any order of the House for its introduction. It is then deemed to have been read a first time.

under ten  
minutes  
rule,

(b) Motion for leave to bring in a bill may be set down for the commencement of public business. If opposed, brief statements from the introducer and opponent of the bill may be made, with leave of the Speaker, and the question is then put that leave be given. This is known as bringing in a bill 'under the ten minutes' rule.'

the  
Orders  
of the  
Day.

(c) The motion for leave to introduce a bill may be an Order of the Day, in which case it comes on as hereinafter described.

We may now suppose that all this preliminary business has been transacted, and that the sitting is one at which Orders of the Day have precedence of Notices of Motion<sup>1</sup>. The Speaker then calls on the Clerk to read the Orders of the Day. We may assume that the day is an uneventful one, whether it be wholly devoted to Government business or whether notices of motion by private members come on at 8.15. Contentious business ends at 11 p.m., and the outstanding orders of the day are then gone through; a future day is fixed by the Patronage Secretary in the case of Government bills,—by the member interested in the case of a private member's bill. The Speaker then adjourns the House without question put, unless a finance bill be under discussion, or unless the standing orders of the House have been suspended for the purpose of concluding or advancing a particular measure.

<sup>1</sup> This is the case at all sittings except those which commence at 8.15 p.m. on the Tuesdays and Wednesdays assigned to private members.

§ 2. *A Public Bill in the Commons.*

When a bill first comes before the House it must come, as has been seen, in the form of a notice of motion. A bill may take its origin from the Lords or the Commons, but it will be convenient to trace it through its progress to the maturity of a Statute, beginning, as most important bills begin, in the House of Commons. We can note afterwards what happens when a bill takes its origin in the House of Lords.

The member who desires to introduce a measure gives notice, as above described, of his intention to do so. I have described above the modes in which a bill may be introduced. Usually this is no more than a form, but on important occasions the purport of the bill is explained on its introduction; when the introduction of a bill is opposed a discussion sometimes of some length may take place, and a division may be taken as to whether leave should be given to introduce it. If the motion is carried an order of the House is made that the bill be prepared and brought in by the mover and other members named by him. The bill is then immediately presented; the member in charge appears at the bar, the Speaker calls upon him by name, he calls out, 'A bill, Sir,' and is desired by the Speaker to bring it up. He brings it to the table, and delivers it to the Clerk of the House, by whom its title is read aloud. The questions that a bill 'be now read a first time,' and that it be printed, are put without amendment or debate, and an order is made that it be read a second time on a day named.

Motion for  
leave to  
introduce  
a bill.

First  
reading.

The bill then takes its place among the orders of the day, and when the second reading comes on in due course a motion is made and question put 'that the bill be now read a second time.' This is the point at which the general principle of the bill is most fully discussed and its fate decided.

Second  
reading.

An opponent may move that the bill be read a second time that day six months, which shelves it for the Session, or may meet the motion that the bill be now read a second time with a direct negative, which shelves it for the day, or may move, by way of amendment to the question, resolutions which affect or alter the character of the bill.

These are all civil ways of rejecting a bill: but there are precedents for a bill being rejected, and torn in the House: and in 1772 a bill was rejected, thrown over the table by the Speaker, and kicked out of the House by members. The offence of this particular bill was that it had been returned from the Lords with an amendment to a money clause<sup>1</sup>.

The bill  
com-  
mitted  
to Stand-  
ing Com-  
mittee,

When a bill has passed the second reading it is committed to one of the four Standing Committees appointed by the Committee of Selection. Each of these Committees consists of from sixty to eighty members: one is specially constituted with a view to the transaction of Scotch business, and consists of all the representatives of Scotch constituencies and fifteen others. A similar preference is given to Welsh members in the composition of any Committee to which measures are referred specially concerning Wales. The Committee of Selection also appoints a panel of chairmen, not more than eight in number, who choose from among themselves the chairmen of these four Committees.

to Com-  
mittee of  
whole  
House,

To the general rule of reference to a Standing Committee there are three sets of exceptions, and in these cases the Bill is referred to a Committee of the whole House.

The exceptions are:—

(a) Bills for imposing taxes, or Consolidated Fund or Appropriation Bills<sup>2</sup>.

(b) Bills for confirming Provisional Orders<sup>3</sup>.

(c) Bills which the House, on motion made directly after the second reading, has decided to retain for Committee of the whole House.

The consideration of a public bill is only one of several purposes for which a Committee of the whole House may be set up. Such a Committee is set up every year for supply, for ways and means, and for some other purposes. Here we only need to note the points of procedure which distinguish the Committee of the whole House and the Standing Committee in their consideration of public bills, and the points which they have in common.

<sup>1</sup> Parl. Hist. vol. xvii, p. 515.

<sup>2</sup> See sect. iii of this chapter.

<sup>3</sup> See *infra*, p. 297.

When a bill is committed to the whole House the Speaker leaves the chair without question put on each occasion that the bill is one of the Orders of the Day. The Chairman of Committees takes his place; if discussion is not concluded at the end of the sitting, the Chairman reports progress and asks leave to sit again. A Standing Committee meets in the morning, must not sit while the House is sitting except by resolution of the Committee moved by the member in charge of the bill, and, apart from these restrictions, fixes its own hours of sitting, and adjourns, at the close of a sitting, to a day and time chosen by itself.

It is open to the House on the motion of a member to give *instructions* to either sort of Committee. There is a general instruction given by Standing Order to all Committees to make any amendments relevant to the bill. The special instructions given by order of the House must be of a very limited character, they must be such as enable the Committee to do something which it would not otherwise be able to do without going beyond the scope and framework of the bill. In all Committees members may not only move all relevant amendments, but may speak more than once in support of amendments moved, or in opposition to them.

The bill is dealt with clause by clause, and new clauses, if proposed to be added or introduced, are not discussed until the existing clauses have been considered.

When the bill has gone through Committee the Chairman reports it to the House, and an order is made that the bill, as amended, be considered. This is called the Report stage of the bill. The Speaker is in the chair, further amendments may be made and new clauses added. At this stage no one can speak more than once, except the member in charge of, or the mover of an amendment to a bill brought from a Standing Committee<sup>1</sup>. If amendments are complicated in character the bill may be recommitted, as a whole, or in respect to particular clauses and amendments.

When the bill has passed through the Report stage, a motion is made and question put that the bill be read a third time; this being carried the House orders that the

<sup>1</sup> Standing Order, 46.

clerk 'carry the bill to the Lords and desire their concurrence' and the bill is endorsed with the words 'soit baillé aux seigneurs.'

**Limitations on debate.** But certain powers as to limitation of debate rest with the Speaker, the Chairman, or with the majority subject to the sanction of Speaker or Chairman, and these must be noted.

**Irrelevance.** Irrelevance or repetition may be stopped by Speaker or Chairman, who may first call the attention of the House or Committee to the conduct of a member and then direct him to discontinue his speech.

**Delay.** Dilatory motions that the House adjourn, or that the Committee report progress, may be put without question by Speaker or Chairman; or he may decline to put such motion at all, if he thinks that it is moved for purposes of delay and in abuse of the rules of the House.

**Disorder.** A member whose conduct is grossly disorderly may be ordered by the Speaker or Chairman of Committee of the whole House to withdraw at once from the House. Should he refuse he may be *named*.

**So far applicable to individuals.** If a member is named by the Speaker for disregarding the authority of the chair or for persistent and wilful obstruction, a motion is made—usually by the leader of the House—that the member be suspended from the service of the House. If the offence take place in Committee the Chairman suspends the work of the Committee, the Speaker takes the chair, the matter is reported to him, and the same procedure follows. The question of suspension is put to the House without amendment or debate<sup>1</sup>.

So much for the restraint which the House can place upon the speech of individual members. But the Speaker may adjourn the House without question put in cases of grave and continuous general disorder<sup>2</sup>: and the majority, with the assent of the Speaker or Chairman, can exercise a very wide power in the limitation of discussion under the rules relating to *closure of debate*.

**Closure.** The existence of the Closure dates from 1881, when the methods of obstruction to business devised by the Irish

<sup>1</sup> The Chairman of a Standing Committee does not possess these powers of suppressing gross disorder.    <sup>2</sup> Standing Order, 21. (Feb. 1902.)

Nationalist party had reached a perfection which threatened The  
to reduce Parliamentary government to a nullity. Begin- Closure.  
ning with temporary expedients, in the nature of Urgency  
Resolutions, the Closure took its place in the Standing  
Orders of the House in the autumn Session of 1882, and  
assumed its present form in the Standing Orders of 1888.

‘After a question has been proposed, a member rising in his place may claim to move “that the Question be now put,” and unless it shall appear to the Chair that such motion is an abuse of the Rules of the House, or an infringement of the rights of the minority, the Question “that the Question be now put” shall be put forthwith and decided without amendment or debate <sup>1</sup>.’

A debate then pending may thus be brought to an issue, and if the motion is carried in Committee or on Report the discussion of a bill may be further accelerated by another provision of the same Standing Order, whereby a member may move with the assent of the chair that certain words of a clause stand part of the clause or that the whole clause stand part of the bill.

These rules are applicable to Standing Committees <sup>2</sup>, but the closure can only be carried if the number voting in the majority be not less than 100; or not less than 20, if moved in Standing Committee.

A far more drastic mode of limiting debate and acceler- The guillo-  
ating business is what is known as ‘closure by compart- tine.  
ments,’ or ‘the guillotine.’ By this process certain periods of time are allotted, by resolution of the House, to the various portions and stages of a bill; at the expiration of each period of time, discussion, whether concluded or not, is closed, and the majority carry that portion of the bill upon which the guillotine has fallen.

The process can only take place by order of the House, How used.  
embodied in a series of resolutions allocating the time to

<sup>1</sup> Standing Order, 26. (March 1887 and 1888.)

<sup>2</sup> Until 1902 the closure could only be moved if the Speaker or Chairman of Committees was in the chair. The power was extended to the Deputy-Chairman in 1902 and to the Chairmen of Standing Committees in 1907.



be given for debate on the parts and stages of a bill; and when first introduced was only employed when it had become plain that without exceptional procedure a bill could only be passed, if at all, by an unusual and inconvenient extension of the Parliamentary Session<sup>1</sup>.

It has now become, in the last three years, a recognized part of our procedure where an important Government bill is reserved for discussion in Committee of the whole House. Before a bill goes into Committee, and therefore before there is any evidence that discussion is likely to be prolonged, fixed periods are assigned for debate on the successive clauses and stages of the bill, and security is thus taken that it will have passed through the House by a given date.

Why  
necessary.

Since the closure and the guillotine are now accepted as features of our Parliamentary procedure it is worth asking what have been the causes which led to their introduction, and how they have affected the character of debate and the relations of parties.

Until the middle of the nineteenth century our rules of procedure were so framed as to provide almost unlimited opportunity for discussion. In reading the reports of the Committees which sat in 1848, in 1854, and in 1861, it is clear that the transaction of business under the rules of that period was only made possible by what Dr. Redlich has happily described as 'the self-imposed parliamentary discipline of the parties.' In 1847 there were eighteen stages of a bill at which general discussion was possible, and if the bill was in Committee for more than one day, debate could arise every time on the question 'that the Speaker leave the chair.' The Orders of the Day could not be reached without the possibility of a debate on the question that the Clerk do now

<sup>1</sup> This procedure was first used in 1887, and applied to the Criminal Law and Procedure (Ireland) Bill when that bill had been in Committee for sixteen days. It was used in the case of the Home Rule Bill of 1893 after twenty-eight days passed in Committee, and in that of the Education Bill of 1902 after thirty-eight days of the Committee stage. It has been used, in all, seven times before 1906, and eleven times in the sessions of 1906, 1907, 1908. See Mr. Balfour's sketch of the history of the guillotine, *Hansard*, 4th Series, vol. cxcvii, p. 999.

proceed to read the Orders of the Day, and dilatory motions for the adjournment could be made without restraint<sup>1</sup>.

Slowly, and almost reluctantly, these opportunities of discussion were reduced to a level at which the transaction of business became possible; but the increasing area of subjects for debate, and the increasing desire of members to take part in a debate, necessitated further change. It was not enough to limit opportunities for discussion, discussion itself must be curtailed.

The recognition of this need might have been longer delayed had there not arisen a party in the House who not merely declined to be bound by the usage or comity of the House, but who set themselves deliberately to bring business to a standstill, and the House itself into contempt.

Even under this provocation the closure was reached by very gradual steps; and yet it must be admitted to be a necessary and useful instrument.

Two effects are noticeable: the exercise by the majority of the power of bringing discussion to a close tends inevitably to accentuate party differences: and the use of the closure compels the House and individual members to pronounce decidedly on questions which many may regard as not yet ripe for decision. Formerly an abstract resolution moved, or a bill introduced, by a private member was apt to be talked out, and the House by prolonging discussion to the limit of the time available escaped committing itself to a principle on which the minds of many were, as yet, in doubt. Now, after a discussion of several hours, the closure is moved and granted, and if carried the question must be put, and men must vote for or against it or deliberately evade a conclusion by abstaining from the division.

This relates to the simple closure, but there is a marked distinction between the ordinary closure and closure by compartments, or the guillotine, in respect of the protection afforded to the minority. The Speaker or Chairman will always refuse the closure if he thinks that the question at issue has been insufficiently discussed, or that the rights of

<sup>1</sup> See Reports of Committees. 1847-8, vol. vii, p. 157; for 1854, vol. vii, p. 73; for 1861, vol. xi, p. 434.

on rights  
of minor-  
ity,

the minority are in any way infringed. In the use of the guillotine there is no such protection. The Government produce their programme for the allocation of time, it is carried with the aid of their majority, and however insufficient may be the time allowed for discussion of any part of the bill in question, the closure falls automatically at the end of that time, without the leave of Speaker or Chairman, and with no appeal.

on charac-  
ter of  
debate,

Since the Government have mapped out the time for discussing the various parts of the bill, the Opposition are not unnaturally desirous of showing that in this, as in other things, the Government are wrong. They are therefore not by any means disposed to accommodate discussion to the Government scheme. Apart from this it is inevitable that a Government, anxious to get business done, should be over-sanguine in their estimate of the time within which contentious matters can be discussed: and if there should be miscalculation as to the importance of clauses, or as to the importance which members may attach to particular provisions of a bill, the time table is falsified, and the fall of the guillotine cuts short or precludes discussion. The result is not satisfactory, and detracts from the importance

on import-  
ance of  
House of  
Commons.

of debate in the Commons. If parties were near to an equality in numbers, and party organization allowed greater latitude to individual opinion, some interest would assuredly be felt in debates on which the fate of a ministry might depend. But when the result of discussion is known beforehand, and argument is met by silence in the House, and by numbers in the division lobby, the public take little interest in speeches which merely serve to postpone a foregone conclusion.

The Par-  
liament  
Act ;

It is, however, impossible to forecast the effect which the conditions created by the Parliament Act may have upon debate in either House.

possible  
results.

The withdrawal from the consideration of the Lords of the financial provisions for the year may disincline a Government to curtail discussion on these matters in the House of Commons.

General legislation stands on a different footing. Here

the Lords can delay but cannot effectively reject a bill. A measure which the Commons desire to pass will pass: if introduced in the first three years of a Parliament it must pass inevitably; if in the last two it will pass in the first or second session of the new Parliament, unless a general election proves adverse to the Government which introduced it.

Under these circumstances debate in the House of Commons may become more important because it is the only debate which can affect the issue; or, on the other hand, a majority, knowing that the measure which it supports must pass, may be impatient of discussion and willing to submit to drastic measures of closure.

Government by discussion may be said to be on its trial. There is good reason to think that some allocation of time for discussion is essential to the conduct of business, but if this is so means should be taken to ensure, by previous consultation, that the rights of the minority are respected, and that time is given for the debate of important features of a bill. The deliberations of the House would then retain what they are fast losing, the interest and the respect of the country<sup>1</sup>. But the defects, such as they are, in our present rules of procedure, owe their worst features to the present condition of our representative system, and cannot be remedied by a mere change in the Standing Orders.

<sup>1</sup> The results of the guillotine may be illustrated from the Education Bill of the autumn of 1908, a measure in which the intentions of the Government were conciliatory and the discussion of a friendly character. A day was allowed for the first clause, which provided for the surrender of church schools to local authorities, the abolition of tests for teachers, and the apportionment of a part of the school hours to religious instruction. Not a line of this clause was discussed. The whole of the allocated time was spent on an amendment, the object of which was to prevent the clause from excluding debate on another subject at a later stage of the bill. The second clause conferred upon religious denominations the right of entry under certain conditions into all schools, and contained seven sub-sections. A day and a half was allowed for this clause, and two-thirds of the first subsection had been discussed when time was up and the guillotine fell. Yet the discussion was friendly and businesslike. Very little further progress was made when the Government abandoned the bill. Legislation on these lines cannot be called government by discussion.

### SECTION III

#### MONEY BILLS

#### § 1. *History and General Rules.*

General  
rules as to  
money  
bills.

Legislation which has for its object the grant of public money, or the imposition of burdens upon the taxpayer, possesses some special features which require to be specially noted.

In the first place such legislation is under the entire control of the House of Commons.

A bill relating to Supply must begin in the House of Commons. It is formulated there, it no longer needs the concurrence of the Lords, nor can it be amended by them on its way to receive the royal assent.

In the second place such legislation only takes place on recommendation from the Crown.

In the third place such legislation must commence in a Committee of the whole House.

History.

We need not trace this right further back than the reign of Richard II, when, as Dr. Stubbs tells us, it became the practice 'that all grants should be made by the Commons with the advice and assent of the Lords, in a documentary form which may be termed an act of the parliament<sup>1</sup>.'

The right seems on one occasion to have been disregarded by Henry IV, though not from any design to override the privileges of the Commons, with the result that the Commons obtained, after a remonstrance, a formal recognition that the grant was theirs. Henry IV, in the year 1407, commenced the financial business of the Session by a discussion with the Lords as to the probable requirements of the service of the year, and the Commons were summoned to be told the result of the discussion. The Commons complained of the prejudice to their liberties which this action involved, and the King at once gave way, and while maintaining the right of the Lords to deliberate with the King on the needs of the kingdom, decided that neither House should make any report to the King on a grant made by the Commons and agreed to by the Lords, or on

Commons  
claim to be  
necessary  
parties to  
grant,

<sup>1</sup> Const. Hist. iii. 459.

any negotiations concerning the same, until both Houses were agreed, and that the report should then be made by the Speaker of the House of Commons, 'par bouche de Purparlour de la dite Commune <sup>1</sup>.'

Until the reign of Charles I the grant was not recited in the preamble of the act which legalized the subsidies as the grant of the Commons alone, but in the year 1625, in the act 'for the grant of two intire subsidies granted by the Temporality,' it is 'your Commons assembled in your High Court of Parliament' who grant the subsidies <sup>then that the grant is theirs,</sup> <sup>2</sup>.

So far the Commons claimed that the grant of supplies should be regarded as theirs; later in the seventeenth century they went further and denied the right of the House of Lords to interfere by amendment or alteration. They resolved in 1671, 'That in all aids given to the King by the Commons, the rate or tax ought not to be altered <sup>that Lords must not amend,</sup> <sup>3</sup>,' and again in 1678, 'That all aids and supplies, and aids to his Majesty in Parliament, *are the sole gift of the Commons*: and all bills for the granting of any such aids and supplies *ought to begin with the Commons*: and that it is the undoubted and sole right of the Commons to direct, limit and appoint in such bills the ends, purposes, considerations, conditions, limitations, and qualifications of such grants: *which ought not to be changed or altered by the House of Lords* <sup>4</sup>.'

Thus far the Lords would appear to have retained the right of rejection, and this, though rarely exercised, had been admitted, specifically, in 1671, and was not disputed until 1860. <sup>may not reject.</sup>

In the meantime the conditions under which supplies were granted had changed in some important particulars. In the time of Charles II the income of the Crown was supposed to meet the ordinary expenses of government. If a special need arose the King asked for supply to meet the need, the Commons, if they granted the supply, imposed a tax calculated to bring in the sum required. The resolutions of 1671 and 1678 denied the right of the Lords to alter the

<sup>1</sup> Stubbs, Const. Hist. iii. 61 and Rot. Parl. iii. 61r.

<sup>2</sup> 1 Com. Journ. 806.

<sup>3</sup> 9 Com. Journ. 235.

<sup>4</sup> 9 Com. Journ. 509.

source, amount, or disposition of the money so granted, though they might admittedly reject the whole.

But in 1860 the taxes of the year, though they might be included in separate bills, formed part of a financial scheme for the service of the year. To reject one of these bills was, in effect, to amend the scheme of the Chancellor of the Exchequer, and this was what happened in 1860. In that year the Commons, among other provisions for the supplies to be granted, made a readjustment of taxation, increasing the property-tax and stamp-duties and repealing the duty on paper. The Lords assented to the bills providing for the proposed increase of taxation, but when the bill for the repeal of the paper duties came before them they rejected it.

Resolutions of 1860.

6 July, 1860.

The Commons met this action on the part of the Lords by resolutions which set forth the privileges of the House in the matter of taxation, and which, while they did not deny that the Lords might have a power of rejecting money bills, intimated that the Commons had it always in their power so to frame money bills as to make the right of rejection difficult, if not impossible, to exercise<sup>1</sup>.

Practical effect was given to this intimation in 1861. From that year onwards it became usual to embody the financial measures of the year in one bill, which the House of Lords could not reject without bringing the finance of the year to a standstill.

Their expansion in practice.

There can be no doubt that the principle of these resolutions expanded, and that the Commons came to regard as a breach of privilege not merely the imposition by the Lords of any charge by way of rates or taxes, but any dealing with the regulation or administration of such a charge: and this in measures not primarily financial but mainly concerned with social changes<sup>2</sup>.

The Finance Bill of 1909.

But the question as to the power of the House of Lords to deal with the finance of the year came to an issue in 1909, and has been settled by the Parliament Act of 1911.

It may fairly be maintained that the Finance Bill of 1909

<sup>1</sup> Hansard, 3rd Series, vol. 159, p. 1383; and see the debate on the Finance Bill of 1894. Hansard, 4th Series, vol. 27, p. 253.

<sup>2</sup> House of Commons Manual of Procedure in Public Business, p. 198.

contained matter which was not strictly financial; and there was no doubt that leading members of the Government ascribed to it effects of a far-reaching social and political character. But when the House of Lords declined to give the Bill a second reading until an opportunity had been allowed to the electorate to pronounce an opinion, they raised issues of far greater importance than the merits of the Finance Bill. With these I have dealt elsewhere.

The Par-  
liament  
Act.

It is enough here to say that a bill which the Speaker holds to be a Money Bill within the terms of § 1 (2) of the Parliament Act, if passed by the House of Commons and sent up to the House of Lords not less than one month before the end of the Session, must be passed by the Lords within one month of its reaching their House, or it will be presented for the Royal Assent and become an Act of Parliament without the consent of the Lords.

Although in the consideration of the constitutional rules which relate to money bills the exclusive right of the Commons to deal with such bills is the topic most frequently dwelt upon, the second rule which I propose to note can hardly be said to be less important.

No petition for any sum relating to the public service, nor any motion for a grant or charge upon the public revenue, whether payable out of the Consolidated Fund, or out of moneys to be provided by Parliament, will be received or proceeded with unless recommended from the Crown<sup>1</sup>.

The House, therefore, while it can determine the amount of money which shall be granted and the sources from which that money shall be drawn, has absolutely precluded itself from determining that any money shall be granted at all, unless the proposal for a grant emanates from the Crown.

Money  
only  
granted on  
recommen-  
dation from  
the  
Crown.

The responsible advisers of the Crown, the ministers of state, are alone capable of proposing that public money should be raised, or if already raised should be spent; and the House would not entertain a motion by a private member for a specific outlay on any object which he might consider deserving of public support. The relations of

<sup>1</sup> Standing Order, 66.



Crown, Lords, and Commons in respect of money grants cannot be better stated than in the words of Sir Erskine May.

‘The Crown demands money, the Commons grant it, and the Lords assent to the grant; but the Commons do not vote money unless it be required by the Crown; nor impose or augment taxes, unless they be necessary for the public service as declared by the Crown through its constitutional advisers!’

No private member may propose specific grant.

It is possible for any member of the House of Commons to move a resolution to the effect that public money might profitably be expended upon purposes specified in the resolution; and if the House agree to the motion it thereby commits itself to a general approval of such an outlay. But it would not be in accordance with the rules of the House for a private member to move that a specific sum be granted for a specific purpose; such a motion could only proceed from a minister of the Crown. For it cannot be too strongly impressed upon the student of constitutional law, that all the money spent upon public service is spent by the Crown; that all the money granted for the public service is granted by the Commons, and that the Commons have imposed upon themselves a rule that they will not grant a penny unless it is asked for by a minister representing the Crown for a purpose specified in the terms of his request.

Such a rule is the great safeguard of the tax-payer against the casual benevolence of a House wrought upon by the eloquence of a private member; against a scramble for public money among unscrupulous politicians bidding against one another for the favour of a democracy. But the rule is not law. Like all other resolutions or standing orders of either House it is a self-imposed rule made by a public body for the guidance of its procedure. It could be altered almost as easily as a College by-law, quite as easily as a rule of the Marylebone Cricket Club. Yet some of the most valuable parts of our constitution are to be found either in practices which depend upon simple usage, or upon rules as insecure as the standing order which I have just described<sup>1</sup>.

<sup>1</sup> May, *Parliamentary Practice* (ed. 11), p. 545.

<sup>2</sup> The possible infringements of this rule by addresses and resolutions of the House pledging the Government to a proposal for outlay, or by

The third rule to note respecting money bills is, that by a Standing Order of the House agreed to on the 29th March, 1707, 'the House will not proceed upon any petition, motion or bill, for granting any money, or for releasing or compounding any sum of money owing to the Crown, but in a Committee of the whole House.' Here we come to the actual process by which the House grants supplies to the Crown.

§ 2. *Committees of Supply and of Ways and Means.*

The practice of setting up a Committee of the whole House to consider supply dates from the reign of James I. The separate Committee to consider Ways and Means for raising the supply first appears in the journals during the Long Parliament<sup>1</sup>, and became the regular practice during the reign of Charles II. But we have here to consider how at the present day the House of Commons grants supplies to the Crown, how it indicates the sources whence those supplies are to be drawn, how it appropriates the supplies granted to the services for which the grant is made.

The Speech from the throne always contains a demand from the Crown for supply, and as soon as the House of Commons has agreed upon an address in reply to the Speech, it has for many years passed two resolutions—one that on a certain day it will resolve itself into Committee of Supply; another that on a certain day it will resolve itself into Committee of Ways and Means.

Estimates of the expenditure of different departments are presented to the House in detail by the ministers responsible for those departments, and, on the day fixed, the House goes into Committee of Supply or postpones the sitting of that Committee until a later day.

Until 1882 the rule prevailed that on every occasion that Supply was an Order of the Day, and on the question being put that 'Mr. Speaker do now leave the Chair,' in order

suggestions, printed in italics, in Bills coming from the House of Lords, are described by Mr. Gladstone, *Gleanings of Past Years*, vol. i, ch. iii, § 20.

<sup>1</sup> Com. Journ. ii. 138.

† ANSON PARLIAMENT

Griev-  
ances  
proceeds  
Supply.

that the House might go into Committee, it was open to a member to move any amendment, however irrelevant to the votes in Supply which it was proposed to take. Long after the establishment of the rule that when a Bill was in Committee the Speaker should leave the Chair without question put, 'the fear of unduly limiting opportunities of debate, and the discussion of grievances<sup>1</sup>,' kept up this rule in the case of Supply, with all the consequent uncertainty as to what might be the subject of debate on any day when Supply figured in the Orders or when the business of Supply would be reached.

Changes  
of 1882,

The present rule, settled in 1882, is that whenever Supply comes on as an Order of the Day the Speaker should leave the Chair without question put, except on the occasions when the House first goes into Committee on each one of the three great groups of estimates—the Army, Navy, and Civil Service. On those occasions an amendment may be moved, or question raised, relating to that group of estimates which the House is about to take into consideration on the motion that the Speaker do now leave the Chair. This is what is known as 'getting the Speaker out of the Chair' on the Army, Navy, or Civil Service vote.

of 1902.

The practice as to taking the necessary votes in Supply is also now settled.

As soon as the Committee of Supply has been set up, and estimates presented, Supply is the first Order of the Day on every Thursday, unless a Minister of the Crown move and the House thereupon order otherwise. Such a motion must be made at the commencement of public business, and decided without amendment or debate.

Twenty days are allowed for the consideration of the estimates in Committee and on report, not counting any days when discussion has arisen on the question that the Speaker leave the Chair. Three days may be added by vote of the House to be decided without amendment or discussion.

If no such addition is made, the business of supply is brought to a close on the 5th of August, or in any case, on the last of the allotted days, at 10 o'clock. On the last

<sup>1</sup> Report of Committee, 1861, vol. xi, p. 434.

day but one every vote not taken is put by the Chairman, and decided forthwith, and the resolutions embodying the votes are reported to the House. On the last day at 10 o'clock the report stage is in like manner brought to a close, and the way is cleared for the introduction of the Appropriation Bill in which these votes are included.

On each of these allotted days one or more votes are set down for discussion; the Opposition are consulted by the Government as to the items of expenditure on which they are most desirous of raising discussion: the minister responsible for the estimate in question explains his policy or replies to criticism, and if he does not get the estimates voted at the close of the debate, they are voted automatically, under the guillotine, on the last allotted day<sup>1</sup>.

It may be asked how far, in the time allotted, it is possible for the House to control, by examination, discussion, and possible reduction, the grant of supply asked for by a minister.

The answer must be that here, as elsewhere, theory and practice are not in accord. It is impossible for the House to discuss the innumerable items of our vast annual expenditure, and the successive days allotted to supply are occupied in the exposition and criticism of the policy of the departments whose estimates come up for consideration. Close criticism of the proposed outlay is the work of the Treasury before the estimates are submitted to the House. Supervision of expenditure, to ensure that the money voted is expended on the purposes for which it has been voted, is the work of the Comptroller and Auditor General and the Committee of Public Accounts. But the House of Commons, although in possession of the figures, has no time, nor even opportunity, for detailed criticism of the items of account.

Extent of  
financial  
control by  
Commons.

At the end of every sitting the Committee resolves 'to report progress and ask leave to sit again.' If the Committee were closed it could only be reopened on a fresh demand of Supply from the Crown, either by royal message or in a speech from the Throne.

Procedure  
of Com-  
mittee.

<sup>1</sup> Standing Order, 15. (April, 1902.)

The Speaker then resumes the Chair, and the Chairman of Committees reports (1) the resolutions to which the Committee have agreed, and the progress made; (2) that the Committee ask leave to sit again. The House then orders the reports to be received on a day named; and that the Committee sit again.

When the resolutions are reported, the House is asked to agree with the Committee in their resolutions. It is not possible to increase the amount or alter the destination of the sums proposed to be granted either in the Committee stage or the Report stage of Supply: and at the end of the Session the resolutions are embodied in the Appropriation Act, to which we shall presently come<sup>1</sup>.

### § 3. *Committee of Ways and Means.*

Com-  
mittee of  
Ways and  
Means.

The Committee of Supply has determined what money shall be granted to the Crown and for what purposes. The next matter for consideration is—Where is the money to come from?

A great part of the revenue of the country arising from taxation is levied under Statutes which are permanent until Parliament otherwise determine, and the proceeds of all taxation are paid into the account of the Consolidated Fund, which is the Government account at the Bank of England.

But some taxation is annually imposed, and all taxation is liable to annual revision. Taxes may be remitted, or increased, or new taxes imposed, if the national revenue exceeds or falls short of the requirements of Government presented to the House in Committee of Supply.

In any case the sums standing to the credit of the Government in the Consolidated Fund cannot be drawn upon without Parliamentary sanction.

**Its duties.** It is the business of the Committee of Ways and Means to frame resolutions: (1) for the employment of this Fund

<sup>1</sup> Where a Bill incidentally creates a public charge the clauses creating the charge must be sanctioned in Committee of the whole House and agreed to on report before they are discussed in Committee on the Bill. May, ed. 11, p. 560.

to meet the needs of Supply; (2) for its replenishment when necessary by the imposition of taxation.

It is in the discharge of the latter duty that the Committee receives from the Chancellor of the Exchequer a financial statement of the year in his Budget speech, and having been informed how far the expenditure of the year is balanced by the proceeds of the permanent taxes paid into the Consolidated Fund, and what remission or increase of taxation is proper for the coming year, passes the resolutions on which the Finance Bill for the year is based.

The work of the Committee of Ways and Means is therefore twofold—to submit resolutions for grants from the Consolidated Fund to meet the needs of Supply, and for the adjustment of income to expenditure by dealing with the taxation of the coming year. Its procedure is similar to that of the Committee of Supply, and its resolutions—reported to the House at the conclusion of each sitting—reach their final result in two bills, an Appropriation Bill, which legalizes the employment of the Consolidated Fund to meet the needs of Supply, and a Finance Bill, which embodies the fresh taxation, or freshly adjusted taxation, of the year.

The Committee of Ways and Means is a curious survival. *Its origin.* It takes its origin from the time when the Commons first began to appropriate their grant of supply to the particular services for which they desired to provide. This was done by assigning the proceeds of a given tax to a given service, and when the House had voted a sum in Supply it would naturally pass on to consider whether existing taxes were available to provide the sum needed, or whether a new tax must be imposed and assigned to the service in question.

At the present day all Supply is met out of the Consolidated Fund, and taxation is imposed, not to meet the wants of an individual service, but on a survey of the whole financial position.

Inasmuch as the successive stages of a money bill are, by the practice of the House, taken on different days, the interposition of the Committee and Report Stage for Ways and Means between the Committee and Report of Supply

and the subsequent stages of the bill seems a needless expenditure of Parliamentary time.

#### § 4. *Appropriation Bill.*

No public money paid without authority of Parliament;

In speaking of the Appropriation Bill I do not wish to recapitulate what I have said elsewhere as to the Treasury, Exchequer, and Audit Departments, and the various machinery by which it is secured that the intentions of Parliament as to the disposition of public money are carried out. It is enough to say that none of the public money, that is, of the money constituting the revenue of the Crown, is paid except by Parliamentary authority, and that about three-fourths of the revenue of each year is appropriated to specific purposes in an Appropriation Act passed in that year.

some payments need annual authority;

For just as some taxation is annually renewed while some does not require to be so renewed, so some payments are annual grants, while some do not require to be annually sanctioned<sup>1</sup>. Thus the payments of interest on the National Debt, and of various salaries and pensions, are required to be made, as they fall due, by the Statutes which create the charge; they do not need to reappear annually in the estimates and run the gauntlet of the Committee of Supply.

some do not.

The sums voted to meet the Army, Navy, and Civil Service estimates cannot be legally paid until they are embodied in the Appropriation Act; and the House of Commons, in order to get the supplies of the whole year into one bill, reserves the Appropriation Bill until the close of the session.

Financial business before 31st of March.

But the financial year ends at midnight on the 31st of March, and the authority given by the Appropriation Act of the preceding year for the issue of money stops then. Yet money will be wanted for the public service between the 1st of April and the passing of the Appropriation Act some four months later, and a good deal of financial business has to be done between the meeting of Parliament and the end of March.

<sup>1</sup> For a fuller account of the distinction between Consolidated Fund Services and Supply Services, see vol. ii, Part ii, pp. 150-155.

Such business has generally two purposes. There may have been miscalculation in the estimates of the preceding year, and some departments may want more than was granted in the Appropriation Act. Supplementary estimates are then presented, passed in Committee of Supply provided for in Committee of Ways and Means, and embodied in a Consolidated Fund Bill <sup>1</sup>. Supplementary estimates.

This only provides for the services until the 31st of March. The Army, Navy, and Civil Service must have the means of subsistence until the Appropriation Act is passed. These branches of the service admit of different modes of provision. A vote of money for one branch of army or navy service when embodied in a Consolidated Fund Act may be used for any other branch of that service; but each department of the Civil Service needs to be separately provided for. Money granted for the use of the Board of Agriculture cannot be employed for elementary education or to meet the needs of the Foreign Office. So it is usual to get some votes in Supply for Army and Navy, and a vote on account for all the branches of the Civil Service, to pass them through the Committee of Ways and Means <sup>2</sup> and embody them in a Bill which, like the Appropriation Bill of which it is an anticipation, is read a first and second time; passes through Committee and is read a third time; goes to the Lords and then passes through the same stages, but with greater rapidity, and receives the royal assent two days before the close of the financial year <sup>3</sup>. Vote on account.

When an Appropriation Bill or Consolidated Fund Bill has received the assent of the Lords it is returned to the Consolidated Fund Bill.

<sup>1</sup> A department may have actually spent more than was granted. Then an *excess vote* is needed, and is passed on report from the Public Accounts Committee.

<sup>2</sup> Votes in Supply are earmarked to particular services or branches of services, but a vote in Ways and Means is only described as 'towards making good the supply granted,' &c. If votes for the Navy and Civil Service have passed through this stage of Ways and Means as well as Supply, the money can be used for the Army, so long as a vote for army services has been obtained in Committee of Supply before the Consolidated Fund Bill becomes law.

<sup>3</sup> This interval is needed owing to the correspondence which has to pass with the Bank of Ireland, where a branch of the Exchequer Account is kept.



Commons, and when the royal assent is about to be given to this and other Bills and the Commons are summoned to the House of Lords for that purpose, the Bill which grants money to the service of the Crown is brought by the Speaker to the Bar of the House of Lords, and handed by him to the Clerk of the Parliament to receive the assent of the Crown. This we may take to represent the fulfilment of the promise made by Henry IV that the grant made by the Commons and agreed to by the Lords should be reported to the King, 'par bouche de Purparlour de la dite Commune.'

Form of  
Finance  
Bill,

A bill for granting money to the Crown, whether by the imposition of taxes, or by the appropriation to supply of money out of the Consolidated Fund, is differently expressed to other bills in its enacting clause.

*Act for granting duties of Customs and Inland Revenue.*

MOST GRACIOUS SOVEREIGN,

We, Your Majesty's most dutiful and loyal subjects, the Commons of the United Kingdom of Great Britain and Ireland, in Parliament assembled, towards raising the necessary supplies to defray Your Majesty's public expenses, and making an addition to the public revenue, have freely and voluntarily resolved to give and grant unto Your Majesty the several duties hereinafter mentioned, and do therefore most humbly beseech Your Majesty that it may be enacted ; and be it enacted by the King's most Excellent Majesty, by and with the advice and consent of the Lords Spiritual and Temporal, and Commons, in this present Parliament assembled, and by the authority of the same, as follows.

of Approp-  
riation  
Bill.

An Appropriation or Consolidated Fund Act is in the same form with some necessary variations.

*Appropriation Act.*

MOST GRACIOUS SOVEREIGN,

We, Your Majesty's most dutiful and loyal subjects, the Commons of the United Kingdom of Great Britain and Ireland, in Parliament assembled, *towards making good the*

*supply* which we have cheerfully granted to Your Majesty in this Session of Parliament, have resolved to grant unto Your Majesty the sum hereinafter mentioned ; and do therefore most humbly beseech Your Majesty that it may be enacted ; and be it enacted by the King's most Excellent Majesty, by and with the advice and consent of the Lords Spiritual and Temporal, and Commons, in this present Parliament assembled, and by the authority of the same, as follows.

#### SECTION IV

##### THE PROCEDURE IN THE HOUSE OF LORDS AND THE RELATIONS OF THE HOUSES

###### § 1. *A Bill in the Lords.*

I will now resume the history of a bill at the point at which it is sent up to the House of Lords with a message that the Commons desire their concurrence. The bill is read a first time as soon as brought up : it then remains on the table of the House of Lords, and if twelve days pass while the House is sitting, and no notice is given of the second reading of the bill, it ceases to appear on the minutes and is dropped for the Session. But if the bill is taken up by a member of the House, the procedure follows the lines of the procedure in the House of Commons. Debate can be raised at some stages of a bill at which it can no longer be raised in the House of Commons. The Lords have not the same reason to fear prolixity of discussion. The bill may be accepted by the Lords without amendment, and then after the third reading it is not returned to the Commons, but a message is sent that the Lords have agreed to the said bill without any amendment. If, however, the Lords amend the bill they return it after the third reading with a message that they agree to the bill with amendments to which they desire the concurrence of the Commons, and endorsed with the words, *A ceste bille avecque des amendemens les seigneurs sont assentus.*

The Commons may agree or disagree with the Lords' amendments to their bill ; whether they agree or disagree

Procedure  
in the  
Lords.

Disagree-  
ment be-  
tween the  
Houses.

the bill is returned with a message to that effect; but if they agree the bill is endorsed with the words *A ces amendemens les Communes sont assentus*. Should there be disagreement and neither House be willing to accept the bill in the form which is satisfactory to the other, there are two modes by which the reasons of difference may be stated so as to bring about an agreement. One of these is a Conference, the other is a statement of reasons drawn up by a Committee of the dissentient House and sent to the other with the amended bill.

A Confer-  
ence.

A Conference is a formal meeting of members appointed by their respective Houses; these members are called Managers. The Managers on behalf of the dissentient House are entrusted with the drafting of reasons for their disagreement, and with the task of reading and delivering them to the Managers of the other House. No argument is used or comment made unless the conference be a free conference, in which case each set of Managers endeavours by persuasion to convince the others or in some way to effect an agreement between the Houses.

A free con-  
ference.

Reasons  
assigned  
in lieu of  
confer-  
ence.

The ceremony of a conference is extremely formal: the Lords sit; the Commons stand: the Commons are bare-headed; the Lords, except when speaking, are only required to take off their hats as they approach and leave their seats.

Practically conferences are not resorted to at the present time. No free conference has been held since 1836, and in 1851 the Houses by resolutions agreed to receive reasons for disagreement, or for insistence on amendments, in the form of messages, unless a conference should be specially demanded by one or other House.

Until 1855 it was customary that messages from the Lords should be conveyed to the Commons by Masters in Chancery, or, on special occasions, by Judges. Messages from the Commons were conveyed to the Lords by the Chairman of the Committees of Ways and Means, or the member in charge of the Bill with which the message was concerned. In 1855 it was agreed that one of the clerks of either House might be the bearer of such messages<sup>1</sup>.

<sup>1</sup> May, *Parl. Pract.* (ed. 11), pp. 436-7.

A message from one House to another is a formal statement of reasons drawn up by a Committee of the House which sends the message. Messages may go to and fro if the Houses cannot immediately come to terms, but the practical discussion takes place between the party leaders, and the settlement is reached, if at all, at informal conferences, the results of which are subsequently embodied in a message.

§ 2. *The Houses in Conflict, and the Parliament Act.*

So far we have considered the ordinary procedure where Ordinary procedure. a difference has arisen between the two Houses. Conference and message are alike formal transactions; informal discussion between party leaders in the two Houses is the practical mode of settling whether a Bill shall pass with amendments agreed to by both Houses, or whether it shall be dropped for the Session.

We have now to consider the procedure contemplated by The Parliament Act. the Parliament Act of 1911. The Act deals with two classes of Bills: Money Bills and other Public Bills.

(1) A Bill sent up to the House of Lords one month Money Bills. before the end of a Session, which in the opinion of the Speaker of the House of Commons is a Money Bill within the meaning of s. 1 (2) of the Act<sup>1</sup>, if not passed without amendment within one month after it is sent up will be presented for the Royal Assent and will become law, though the House of Lords have not consented to the Bill.

(2) A Public Bill which is not a Money Bill, nor a Bill Other Public Bills. to extend the duration of Parliament, and which is passed by the Commons in three successive Sessions, not necessarily of the same Parliament, and rejected by the Lords in each of these Sessions, will become law without the assent of the Lords provided that two years have elapsed between the date of its second reading in the House of Commons in the first of the three Sessions and its passing that House in the third of those Sessions.

In an earlier chapter I have described the part which pp. 149, 150.

<sup>1</sup> For the definition of a Money Bill under 1 & 2 Geo. V, c. 13, s. 1 (2), see p. 149, where the duties of the Speaker are set forth.

the Speaker is required to perform in certifying that a Bill under ss. 1 is a Money Bill, and that a Bill under ss. 2 is the same Bill in the successive Sessions through which it passes.

**Results.** The House of Lords is now no longer co-ordinate in legislation with the House of Commons; its decision may be overruled without an appeal to the country.

**Courses open to Ministers when Houses could not agree.** The Parliament Act transfers legislative sovereignty to the Commons, subject only to the Royal Assent. But the process by which the Parliament Act became law is also important as illustrating the methods by which the action of the House of Lords can be forced into harmony with that of the House of Commons. Hitherto, if the Lords rejected a Bill which had come up from the Commons, or declined to pass it without amendments to which the Commons could not agree, ministers responsible for the Bill had certain courses open to them.

**Concession.** They might induce their followers in the Commons to accept the Lords' amendments; or they might drop the Bill.

They might resign office, in which case their successors, being presumably in a minority in the Commons, would be compelled to ask for a dissolution.

**Dissolution.** They might, themselves, ask for a dissolution in the hope that the verdict of the country would be in favour of themselves and their measures, in which case the Lords would certainly give way.

**Creation of peers.** They might by invoking the prerogative of the Crown for the creation of peers change the balance of power in the House of Lords.

**Previous creation.** The last occasion on which peers were created to provide a Government with a majority is almost contemporary with the last occasion of the refusal of the Royal Assent to a Bill. Queen Anne used the prerogative of the veto in 1707; in 1712 she consented to create twelve peers in order to secure the assent of the Lords to the Treaty of Utrecht. Since then there have been two occasions when such a creation of peers has been seriously contemplated. The passing of the Reform Bill in 1832, of the Parliament Bill in 1911, was in each case procured by a statement that the King

had consented to create peers in sufficient numbers to provide a Government majority in the House of Lords.

The employment of the prerogative to introduce a number of persons into a legislative assembly, for the sole purpose of determining a vote on a particular occasion, would seem to be a use of legal power which nothing could justify but the imminent risk, in the alternative, of public danger.

Character  
of this  
preroga-  
tive.

We condemn the creation of small boroughs by the Tudor sovereigns on the assumption that those constituencies were intended to return nominees of the Court and thus to bring the action of the House of Commons into harmony with the views of the Crown and its Ministers. It is not easy to distinguish the cases, or to admit the propriety of coercing or influencing either House by additions to its numbers in order to secure compliance with the wishes of the executive.

We must consider the conditions under which the exercise of this prerogative has been placed at the service of Ministers in 1832 and in 1911.

Its use in  
1832 and  
1911.

In 1831 and 1832 the Peers were not only acting in opposition to the House of Commons, they were also acting in opposition to the wishes of the electors, expressed clearly and emphatically at the general election of 1831. In April of that year the first Parliament of William IV was dissolved because, after the House of Commons had passed, by a majority of one, the Reform Bill introduced by Lord Grey's ministry, there were evident signs that the progress of the Bill would be embarrassed and its character altered in Committee. The general election of 1831 returned a House of Commons which passed the Reform Bill on its second reading by a majority not of 1 but of 136. The Bill went up to the House of Lords and was rejected by a majority of 41. It was then once more introduced into the House of Commons and on this occasion the second reading passed by a majority of 162. It went up to the Lords, was passed on second reading by a majority of 9, and was in obvious danger of being destroyed in Committee.

Condi-  
tions of  
1832.

There was no doubt as to the wishes of the country, nor was there any doubt that the House of Lords was prepared to disregard the wishes of the country. Under these cir-

cumstances the King consented to such a creation of peers (perhaps eighty in number) as would enable the Bill to be carried through the House of Lords. At the same time he averted the necessity for such a creation by addressing a private communication to the Tory peers which induced them to withdraw from further opposition to the Bill.

Between 1832 and 1911 many changes took place which, incidentally, but in important respects, affected the relations of the two Houses.

Until the passing of the Reform Act 1832 the Peers, through the nomination boroughs, and by the exercise of local influence, were able, to an appreciable extent, to determine the composition of the House of Commons.

This connection between the two Houses was severed in 1832, and the electoral reforms of 1884 and 1885 have widened the gulf which separates a Chamber whose members sit there by hereditary right from one whose members are often the nominees of a party organization, and are chosen on a democratic franchise.

Conven-  
tion subse-  
quent to  
1832.

In the years which followed 1832 a convention came into existence to the effect that when the country has emphatically pronounced in favour of a measure, and when that measure has been formulated and passed in the House of Commons and sent up to the House of Lords, that House will acquiesce, although the measure is one of which the majority of the Peers may disapprove.

Irish  
Church  
Bill.

The convention is best exemplified by the attitude and language of Lord Cairns when in 1869 the Irish Church Bill came before the House of Lords.

‘There are questions which arise now and again—rarely but sometimes—as to which the country is so much on the alert, so nervously anxious, and so well acquainted with their details, that it steps in as it were, takes the matter out of the hands of the House of Lords and the House of Commons, and substantially tells both Houses of the Legislature what it requires; and in those cases either House of Parliament or both together cannot expect to be more powerful than the country, or to do otherwise than the country desires.’

But this convention left open a large debatable ground,

for the Peers might object to the form and order in which measures which they are ready to accept are presented to them; they may question the certainty of the alleged expression of the opinion of the country, or the sufficiency of the consideration given to a measure in the House of Commons.

The first of these difficulties is illustrated by the events of 1884. In that year a Bill for a large extension of the franchise was carried through the House of Commons by great majorities, and there was no doubt that, at the preceding general election, the country had pronounced decidedly in favour of the proposed extension. The measure involved a great change in the distribution of seats, but the Government proposed to postpone the legislation on this subject until the Franchise Bill had become law.

The House of Commons acquiesced in this method of dealing with the two subjects. The Lords said, with reason, that before agreeing to a great increase in the electorate they were entitled to know how political power, so largely extended, would be distributed throughout the country.

They therefore declined to proceed with the Franchise Bill until the Redistribution Bill, which was to follow it, was placed in their hands. The dispute did not touch the merits of the Franchise Bill, it really concerned the time and order in which certain measures should be introduced. The issue was obscured, as happens in such cases, by misunderstandings and imputations of motive, but the result was a compromise. Mr. Gladstone and his colleagues produced their scheme for a redistribution of seats; a Bill to give effect to it was settled in consultation by the leaders of the two parties; the Lords thereupon passed the Franchise Bill and the dispute was at an end.

But the duty of the Lords, as laid down by Lord Lansdowne in 1906, was

‘to arrest the progress of measures whenever we believe that they have been insufficiently considered, and that they are not in accord with the deliberate judgment of the country.’

Debat-  
able  
ground.

Sequence  
of  
measures.  
Franchise  
in 1884,

and Redi-  
tribution.

Doubt as  
to judg-  
ment of  
country.



There can be no doubt that it has become increasingly difficult since 1885 to say whether a Bill which has passed the House of Commons necessarily represents the deliberate judgment of the country, and this for several reasons.

Defects of  
representation.

The creation of single member constituencies by the legislation of 1885 and the growth and change in the population of the electoral areas has produced curious electoral results. The balance of parties in the House of Commons frequently does not correspond with the balance of opinion in the country; and the number of members returned to support a party policy is often very disproportionate to the number of votes polled in favour of that party and its policy.

Confusion  
of issues.

To this we must add that a general election often presents such a variety and confusion of issues as may well puzzle an electorate which depends for its information on the polemical utterances and literature of the occasion. The result may not signify an unhesitating pronouncement in favour of some or all or any of the measures which have formed the topic of election speeches. The electorate may merely desire a change of men, or may be content with an existing Government. And there is another reason, besides the imperfections of our electoral system, which may cause us to doubt whether the decisions of the House of Commons always represent the wishes of the country.

Dominance of  
groups.

The House is no longer divided into two great political parties; it is broken into groups. The Nationalist group and the Labour group are independent; they are also irresponsible, for their leaders could not, even if they would, assume the responsibilities of government. But they are sufficiently numerous to determine the fate of ministries. Their wishes may not be the wishes of the electorate, but their support may be necessary to the existence of a Government.

Hence it may come to pass that a measure which if presented by itself for acceptance or rejection would not find favour with the electors may be pressed through the House of Commons under the influence of a group.

The doubts which thus arise as to the infallibility of the House of Commons in expressing the will of the people, coupled with the increasing restriction of debate in that House, have caused the House of Lords to exercise very freely their powers of amendment and rejection in the case of Bills which were designed to affect large constitutional or social change.

In 1906 the House of Lords rejected, on the second reading, a Bill to abolish plural voting, on the ground that the measure was only part of a scheme of electoral reform which should be presented to the country as a whole. They also amended, in many of its most controversial features, an Education Bill which had occupied the House of Commons for many weeks. The Commons rejected the Lords' amendments in their entirety, and after some negotiations and ineffectual concessions the Bill dropped.

As a result of this action of the Lords Sir Henry Campbell Bannerman, in 1907, moved a resolution, which was carried after three nights' debate, to the effect that the powers of the House of Lords to alter or reject Bills passed by the Commons 'should be so restricted by law as to secure that within the limits of a single Parliament the final decision of the House of Commons shall prevail.'

In 1909 the House of Lords declined to pass the Finance Bill of the year on the ground that it embodied principles of taxation so novel in character as to need the express approval of the electors before passing into law. Parliament was dissolved. At the general election which took place in January, 1910, the Government lost more than 100 seats, and the two great parties were left almost on an equality of numbers; but Mr. Asquith, supported by the votes of the Nationalist and Labour groups, could command a majority of 120.

The House of Lords accepted the verdict of the general election and passed the Finance Bill; nevertheless the Government introduced resolutions, subsequently embodied in the Parliament Bill, with a view to the curtailment of the powers of the Second Chamber. These resolutions were carried in April, 1910, after a discussion which lasted

Restric-  
tion of  
debate.

Conse-  
quent  
action of  
Lords in  
1906.

Resolution  
of 1907.

Finance  
Bill, 1909.

Parliament Bill,  
1910.

for eleven days of Parliamentary time, and the Parliament Bill of 1910 was introduced and read a first time without discussion.

The death of King Edward VII, and the Conference in which the leaders of the two parties endeavoured to come to terms on the constitutional questions in issue prevented further discussion until November.

Conference of  
leaders.

The Conference broke up without result, and as those who took part in it were bound to secrecy, we have no knowledge of the concessions which either party was prepared to make, nor of the point at which negotiation became useless. What happened afterwards we learn from Mr. Asquith, speaking in the House of Commons on the 7th August, 1911.

Events of  
November, 1910.

On the 15th November, 1910, the Cabinet advised the King to dissolve a Parliament which was not a year old, and which never had the opportunity of discussing the Parliament Bill. But at the same time they asked for a promise that

‘in the event of their policy being approved by an adequate majority in the new House of Commons, His Majesty would be ready to exercise his constitutional power, which may involve the prerogative of creating peers, if needed to secure that effect shall be given to the desire of the Government.’

They further advised

‘that no communication of the intention of the Crown should be made public unless and until the actual occasion should arise.’

Mr. Asquith goes on to say that

The  
King's  
promise.

‘His Majesty after careful consideration of the circumstances past and present, and after discussing the matter in all its bearings with my noble friend and colleague Lord Crewe, felt that he had no alternative but to assent to the advice of the Cabinet.’

The circumstances under which the prerogative was placed at the service of Ministers are peculiar, and differ very widely from those of 1832.

The Parliament Bill had never been discussed in either House; the electors therefore had not the opportunity which

a full discussion would afford of hearing all that might be said for or against the Bill. The result of a general election was uncertain; the issues which might arise in the course of debate in the new Parliament, the character of the opposition, the purport of amendments were equally uncertain.

But with all these contingencies in view the King was advised to promise to his Ministers such an exercise of the prerogative as to secure 'that effect should be given to the desire of the Government.'

Shortly, it may be said that Lord Grey advised William IV to exercise a discretionary prerogative when the moment for the exercise of discretion had arrived. Mr. Asquith advised His Majesty to promise him the exercise of this power when a long interval of time must elapse, and many intervening contingencies might arise before the power could be called into action.

In the result, a prerogative which eminently needs the impartial discretion of the Sovereign at the moment of its exercise, was placed unreservedly in the hands of Ministers necessarily biassed by the interests of party, many months before the exercise of this power could be required, or the conditions of its exercise foreseen.

The general election gave to Ministers a majority dependent on the support of the Nationalist and Labour parties. The Parliament Bill passed the Commons. When it went up to the Lords amendments were introduced mainly directed to secure an appeal to the country before great legislative changes could be made on which the country had not deliberately pronounced.

It was then that Mr. Asquith, in a letter to Mr. Balfour, announced the intention of His Majesty to exercise the prerogative of creating peers in sufficient numbers to ensure the passing of the Bill without these amendments.

What followed is very recent and controversial history. In a crucial division a large number of peers abstained from voting for or insisting on the amendments introduced by the Lords, and a sufficient number voted against such insistence to ensure the passing of the Parliament Bill in

**Its effect.** the form desired by the Government. Thus for the second time, though under different conditions, the House of Lords has avoided, by submission, a threatened creation of peers; a creation on a scale which would have expanded the House to ludicrous proportions. Differences between the two Houses will not be settled, as heretofore, by compromise or by an appeal to the people; the House of Commons can now, after a brief interval, carry its measures in the form it pleases.

It cannot be said that the passing of the Parliament Act has put an end to the possibility of a further employment of this prerogative. It is conceivable that Ministers, impatient of the two years' delay which may precede the fruition of their legislative programme, or subjected to pressure by a dominant group, may again find reasons for recourse to methods which students of the constitution had supposed to be out of date.

But the Preamble to the Parliament Bill promises a reconstitution of the Second Chamber, and a definition of its powers. It is to be hoped that a revision of our constitution, which is clearly necessary, will be carried into effect with more regard to the well-being of the community than to the interests of a party.

## SECTION V

## PRIVATE BILL LEGISLATION

§ 1. *Historical outline.*

The passing of a private bill is, at the present time, a proceeding partly legislative, partly judicial. Such a bill commences by petition; it is furthered by persons outside the House, the promoters, who have some practical interest in the passing of the bill: it relates to matters of individual, local, or corporate interest. Although it passes through the forms of a public bill, and although these forms are a vital part of its progress, yet the most interesting and important stage of that progress is its passage through Committee, which is for the purpose of private bill legislation a select Committee of one or other House. This Committee acts as a judicial tribunal before whom counsel appear on behalf of the promoters or the opponents of the bill in question.

The history of private bill legislation might lead us to a great deal of very interesting inquiry concerning Parliamentary antiquities<sup>1</sup>, but with these it is only possible to deal in the most general way. The petition with which the bill commences was the only method in the Middle Ages for obtaining rights or the enforcement of rights which the Common Law Courts could not confer or assure. If a man had to complain of inequitable dealings in the

A private bill is partly a judicial proceeding.

Originally the petition of an individual.

<sup>1</sup> The learning of this subject is made extremely interesting in Mr. Clifford's work on Private Bill Legislation, where the historical side of the question is amply treated.

matter of property or contract, he petitioned the Crown or the Crown in Chancery. If he had to complain of violence or oppression, such as the ordinary Courts could not or dared not redress, he petitioned the Crown in Council. If he was not in search of equity or of law, but wanted to get the law altered in his favour, he petitioned Parliament, sometimes addressing himself to King, Lords, and Commons, sometimes to Lords and Commons, sometimes to the Commons alone, sometimes to the King or to the King in Council.

Addressed  
to Parlia-  
ment.

See ch. ix.  
§ 4.

Cease in  
time to be  
wholly  
personal.

'Private'  
and 'Lo-  
cal' Acts.

The petitions from which private bill legislation takes its origin are those which it became the practice in the reign of Henry IV to address to Parliament, or to the Lords or the Commons<sup>1</sup>. Such petitions were not handed, as in earlier procedure, to the Receivers and Triers of Petitions nominated (as they were nominated until 1886) at the commencement of each Parliament. They went to the House to which they were addressed, generally the Commons, and after consideration there, were passed on with the endorsement, '*soit baillé aux seigneurs*.' Such petitions were at first of a purely personal character, attainders or the reversal of attainders, rewards given or punishments inflicted in individual cases. Later comes local legislation, the regulation of fisheries, of the navigation of rivers, of harbours, the prevention of floods, and the inclosure of commons. Last comes legislation on behalf of bodies incorporated for commercial purposes, requiring, in furtherance of those purposes, some interference with private rights. Such are the acts passed to confer powers on railway, gas, and tramway companies, of which every session affords numerous examples.

The first of these three groups is at the present time distinguished from the rest by the title of 'Private Act,' and relates to naturalization, to dealings with trust estates, in rare cases to divorce. The last two are included under the general term 'Local Acts,' and cover almost the whole ground of private bill legislation.

<sup>1</sup> Stubbs, Const. Hist. iii. 460, and n. 4.

§ 2. *Procedure in respect of private bills.*

It would be impossible without entering into technicalities and details unsuited to the compass and character of this book, to attempt to do more than give a very general outline of the process of private bill legislation. Enough may be said, however, to show the nature of these half legislative, half judicial proceedings, and the care with which the Houses guard themselves against legislating in the interest of private persons or of corporations to the detriment of individual interests, unless they are satisfied that public purposes are to be attained for which individual interests may fairly be set aside with compensation for loss sustained.

By the 21st of December, in the year before the bill is to be brought forward, a petition for the bill must be deposited in the Private Bill Office of the House of Commons, together with a copy of the bill and certain explanatory documents required by the Standing Orders of the House<sup>1</sup>.

Here too are sent memorials from parties interested in preventing the passing of the bill, to the effect that the Standing Orders of the House have not been complied with in the presentation of petition, bill, and documents.

On the 18th of January the petitions and memorials are dealt with by two Examiners, one appointed by the House of Lords, the other by the Speaker. If no one appears in support of a petition, it is struck out, but in the ordinary course the agent concerned in promoting the bill offers proof that the Standing Orders have been satisfied; those who have presented memorials against the bill are heard, not on the merits of the bill, but on the preliminary question of compliance with the Standing Orders; witnesses are called; and at the conclusion of the hearing the petition is endorsed by the examiner and returned to the Private Bill Office. If the endorsement is to the effect that the Standing Orders have been complied with, no more is said; but if the examiner decides adversely to

<sup>1</sup> The procedure of the Lords in respect of Private Bills differs in points too technical to be dealt with in a sketch of the subject.



the petition on this point, he makes a report to the House of Commons, and sends a certificate to the House of Lords to indicate the non-compliance.

Want of  
compliance  
may be  
condoned  
by House.

But the preliminaries are not yet over, nor is the bill lost because the examiner has found that the Standing Orders have not been complied with. The petition is in any case presented to the House of Commons by a member three days after endorsement; if reported against by the examiner it is referred to the Standing Orders Committee, consisting of eleven members of the House, who consider whether the Standing Orders may be dispensed with, and even if the Committee report adversely to the bill their report may be overruled by the House.

So far the rules of the House are careful to provide that all persons interested in the proposed bill may have full notice by advertisement, and full information by access to documents of the intention and nature of the proposed bill.

First  
reading.

The bill is read a first time, and is then, upon notice given of the second reading, referred back to the Private Bill Office for examination, lest the form in which it is drawn should violate the Standing Orders, or depart from the terms in which leave was given for its introduction.

Second  
reading.

It is then read a second time, and here if at all the general principle of the bill is discussed in the House: but the effect of a second reading is not, as in the case of a public bill, to affirm the principle of the bill, it merely indicates that the bill contains no obviously objectionable features.

Reference  
to Com-  
mittee.

When read a second time, the bill is committed. If it is a railway or canal bill, it goes to a standing committee for those matters: if it is not such a bill, it goes to the committee of selection<sup>1</sup> which arranges the bills and assigns them to committees consisting of four members and a referee.

Renewed  
inquiries  
as to form.

But further precautions are taken before the Committee deals with the bill. The Chairman of Ways and Means for the Commons and the Chairman of Committees for the House of Lords examine all bills before they are passed

<sup>1</sup> This consists of the Chairman of Committee on Standing Orders and seven other members.

into Committee. They may report any special circumstances in connection with the bill either to the House or to the Chairman of the Committee, or may recommend that a bill to which no opposition has been offered should be treated as opposed. They may introduce amendments, within the scope of the bill, and amendments may be introduced by public departments interested in the matter of the bill, as by the Board of Trade in a Railway Bill.

The Committee stage is the really interesting and exciting part of the career of a private bill, for there the judicial aspect of the House in its dealings with these measures is brought into strong light: and it appears in a judicial character not as in the preliminary stages of the bill to ensure compliance with forms of procedure, but to hear a keen and animated contest upon the merits of the bill conducted by counsel for the promoters and opponents, and supported by witnesses examined upon oath.

But the opponents of a bill have to go through various formalities before they are permitted to appear in that capacity. The opponent of a bill must first deposit a petition at the Private Bill Office within ten days after the first reading. He must then be prepared to meet objections raised by the promoters of the bill to his right to be heard, and such objections are raised and argued before a court of referees, consisting of the Chairman and Deputy Chairman of Ways and Means with seven members appointed by the Speaker, to determine the *locus standi* of petitioners against a bill. Questions of *locus standi* are argued by counsel before this court, and the right of an opponent to be heard in Committee against the whole or against any clauses of the Bill is there settled<sup>1</sup>.

This is the process by which the right of opposing a bill or any part of a bill is ascertained and limited; when this is settled the Committee sits to hear the parties; counsel then appear for the promoters of the bill and for the petitioners against it, witnesses are examined, and the whole proceeding is of a judicial character, though con-

<sup>1</sup> The Lords have no Court of referees, and these questions are heard by the Committee on the Bill.

ducted before a tribunal not perhaps very familiar with judicial functions.

If the preamble of the bill is proved to the satisfaction of the Committee, the clauses are taken in order; if the preamble is rejected, the bill falls to the ground. When the Committee has been through the bill it is reported to the House, and its subsequent stages are similar to those of a public bill except in the form, to be described presently, in which it receives the Royal assent.

Much might be added as to the process of classification of private bills, and the details of procedure in respect of them. But since these are not matters of constitutional importance, and can easily be found in books of Parliamentary practice or in the published Standing Orders, I do not propose to carry the subject further.

As the ordinary course of Legislation depends almost entirely upon the rules which each House adopts for the regulation of its procedure, it is well to note that these fall into three classes.

Rules  
governing  
process of  
Legisla-  
tion.

There are *standing orders*, resolutions as to procedure, which each House intends to be permanent, and these, though they may at any time be repealed or suspended by resolution, endure from one Parliament to another in default of such repeal or suspension.

There are *sessional orders*, rules which last only for the session, and are renewed at the commencement of each session.

There are *indeterminate orders* and resolutions. Such are resolutions declaratory of practice and usage which expire with the session in which the resolutions were passed. These are not, technically, standing orders, though they are observed from session to session, and are regarded as regulations operating in the same way as a standing order.

## SECTION VI

### *Provisional and other Statutory Orders and Rules.*

I must not conclude the subject of the Process of Legislation without noticing the delegation of legislative powers

to government departments; an important, and an increasing practice. Such legislative powers are sometimes exerciseable without further reference to Parliament, sometimes their exercise is more or less subject to Parliamentary supervision.

Provisional Orders are, of these forms of departmental legislation, the nearest akin to private bills. They are made by a government department acting under statutory powers, and their object is to give effect to schemes or proposals of local bodies and companies, subject in the first instance to the approval of the department, and finally of Parliament.

Provisional  
Orders.

These orders are arranged in groups by the department from which they proceed, and thus grouped are placed in schedules to Bills which come before the Houses of Parliament for confirmation. On the first reading of such bills they are referred to the examiners, mentioned in the previous section, to ensure that the Standing Orders are complied with. If opposition is offered to any Order, 'the confirming Bill is referred to a select committee and thereupon the opposed Order is treated as a private Bill: the preamble must be proved by evidence, and the promoters, though relieved from the payment of House fees, are liable to all other costs of procedure in Parliament besides the expense incurred in carrying the Order through the department<sup>1</sup>.'

Illustrations of the subject of such procedure are Orders conferring powers to make piers, harbours, tramways, to employ electric lighting, to create local government or sanitary districts.

The Provisional Order, being to all intents a form of private bill legislation, has no force whatever until the confirming bill wherein it is scheduled passes both Houses of Parliament and receives the royal assent.

Briefly it may be said of Provisional Orders that they are made by a government department in pursuance of a statute; that they are scheduled in a Bill which goes through all the stages necessary to turn a Bill into an Act;

Provisional  
Order Bill.

<sup>1</sup> Clifford, *Private Bill Legislation*, li. 677.

but that unless objection is specifically raised they are not discussed, but are accepted by the House on the authority of the department from which they emanate.

The following form exhibits the character of a Provisional Order and the Bill which confirms it:—

### A BILL

to confirm certain Provisional Orders of the Local Government Board relating to the city of Manchester, and the boroughs of Middleton and Stafford.

Whereas the Local Government Board have made the Provisional Orders set forth in the schedule hereto, under the provisions of the Public Health Act, 1875. And whereas it is requisite that the said Orders should be confirmed by Parliament:

Be it therefore enacted by the Queen's most excellent Majesty, by and with the advice of the Lords Spiritual and Temporal, and Commons, in this present Parliament assembled, and by the authority of the same as follows:—

1. The orders set out in the schedule hereto shall be and the same are hereby confirmed, and all the provisions thereof shall have full validity and force.

2. This Act may be cited as the Local Government Board's Provisional Orders Confirmation (No. 16) Act, 1889.

Orders  
made  
under  
statutory  
powers.

Other Orders are made every year which do not go through the form of provisional orders. They are very numerous, and often relate to important matters.

They vary in character.

Their  
character,

Some are made by bodies constituted for a time and invested with statutory powers, such as the Public Schools or University Commissioners; others are made by government departments. Some are purely local in character, such as schemes made by the Ecclesiastical Commissioners, or the orders which fix boundaries of parishes or confirm the by-laws of a municipal corporation: some are of a public and general character, such as the rules made by the judges under the provisions of the Judicature Acts; some stand midway between local or private and public or general enactments, such as the statutes made by University Com-

missioners for the Universities and Colleges of Oxford and Cambridge under the Universities Act, 1877.

They vary in duration.

Some are temporary, such as Orders made by a Committee of the Privy Council or by the Board of Agriculture touching the importation of cattle or the muzzling of dogs. Others are intended to be permanent, such as the charters which the King grants on the advice of the Privy Council creating corporations for objects prescribed and defined by Statute; such too are Orders for the discontinuance of burial grounds or fixing boundaries of parishes. Others are varied annually, as are the minutes of the Board of Education, commonly called the Code, which regulate the conditions of the Parliamentary grant to public elementary schools.

They vary, lastly, in the procedure necessary to give them force.

Some must be submitted to the Privy Council, may be there questioned, and afterwards must then be laid upon the tables of the two Houses for a fixed period of time. Such has been the procedure in the case of bodies created for a time but invested with powers of making ordinances of a permanent character. The Commissions which inquired into the condition of the Universities of Oxford and Cambridge, and the Colleges therein, possessed the power to make statutes regulating those societies, but these statutes were required to be submitted to the Queen in Council, and, unless there petitioned against and disallowed, were after twelve weeks to be laid before both Houses of Parliament: then, unless during the ensuing twelve weeks either House addressed the Queen against the statutes, they were to be approved by Her Majesty in Council. The Commissioners appointed under the Public Schools Act of 1868 were not required to lay before Parliament the Statutes made for the regulation of the Schools in question unless made without the concurrence of the governing bodies of those schools.

Other Orders, again, are laid before Parliament without the intervention of the Privy Council: such are Rules of

the Supreme Court made by the Judges, or certain regulations made by the Secretary of State and Council of India, or, to take a recent illustration, the regulations made by the Treasury in conjunction with the Local Government Board for the administration of the Old Age Pensions Act.

Other Orders, again, may be brought before Parliament, if the King in Council is addressed with that object. Such are schemes made by the Board of Education acting under powers originally conferred upon the Endowed Schools Commissioners.

their in-  
crease,  
its causes  
and  
effects.

But a great and perhaps increasing number of these Rules and Orders are made by Government departments under statutory powers, and take effect at once, or at a given date, without any requirement that they should be submitted to the Privy Council or to Parliament<sup>1</sup>. The difficulty of carrying a complicated measure of legislation through the House of Commons is responsible for the tendency to leave matters of detail to be formulated by rules made in the Department which is concerned with the administration of the statute in question or by by-laws to be framed by a local authority subject to the approval of a Department. The power of the executive necessarily grows as the intervention of the State in the concerns of daily life outgrows the capacity of Parliament to discuss and determine these matters within the limits of Parliamentary time.

<sup>1</sup> The most important of the Statutory Rules and Orders for each year are now published annually, and the hitherto pathless wilderness of existing rules and orders has been made plain by the *Index to the Statutory Rules and Orders* in force on January 1st, 1891.

## CHAPTER VII

### THE CROWN IN PARLIAMENT

I HAVE now traced the progress of a bill up to the point at which it has received the assent of both the Houses, of the Lords Spiritual and Temporal and the Commons in Parliament assembled. In order that it may become law it still requires the Royal assent: it requires to be 'enacted by the King's most excellent Majesty.'

We come, therefore, to the functions of the Crown in Parliament; these extend beyond the mere process of enacting, and fall under three heads. Topics to be dealt with.

First, we may regard the Crown as constituting Parliament and bringing it to an end.

Secondly, we may regard the Crown as communicating with Parliament while Parliament is sitting.

Lastly, we may regard the Crown as a party to legislation, as giving validity to laws proposed by Parliament, as turning a bill into an act.

#### § 1. *The Crown as constituting Parliament.*

It is the King who constitutes Parliament; the Houses meet by Royal invitation; they assemble in the Royal palace at Westminster<sup>1</sup>; they are opened by the Royal permission; they continue in existence and working during the Royal pleasure.

I have sufficiently described in an earlier chapter the process of summoning, opening, proroguing, and dissolving

*Securities for summons and session of Parliament.*

<sup>1</sup> The Houses of Parliament are described in a Statute (see 30 & 31 Vict. c. 40) as Her Majesty's new Palace at Westminster, commonly called the Houses of Parliament. For the character of the building as a Royal Palace, see *Combe v. Delabere*, 22 Ch. D. 333.



Parliament. I will, therefore, confine myself here to noting the obligations which rest upon the Crown to call a Parliament into existence, and to enable a Parliament, while it is in existence, to sit.

The Statutes which have been passed on this subject are four; and of these only one remains in force; so scanty is the direct legal security for the frequent summons and session of Parliament.

Annual  
Parlia-  
ments.

The first is 4 Ed. III, c. 14, which enacts that 'a Parliament shall be holden every year once, and more if need be'; this was re-enacted in the thirty-sixth year of the same reign, but the words 'if need be' seem to have been treated as applying to the whole clause, and Parliaments were often intermitted for years together. This Statute was repealed by the Statute Law Revision Act, 1863.

Triennial  
Parlia-  
ments.

The second was an Act of the Long Parliament, 16 Car. I, c. 1. This Act provided that if the King neglected to call a Parliament for three years, the peers might issue out writs, and that if the peers neglected to do so, the constituencies might elect a House of Commons for themselves. The loyalty of the succeeding reign repealed this Statute in 1664 as being 'in derogation of His Majesty's just rights and prerogative inherent to the imperial crown of this realm.' And indeed it proceeded on the assumption, reasonable in itself, though unhistorical, that the Lords and Commons assembled, not because the King wanted their advice, but because they desired, and because the constituents of the members of the Commons desired, that the action of ministers should be discussed by persons who, though not responsible for the conduct of public business, had an interest in seeing that it was conducted well.

Triennial  
Session.

But the Act<sup>1</sup> of Charles II did something besides repeal the Act of the Long Parliament, for it provided that '*the sitting and holding of Parliament shall not be intermitted or discontinued above three years at the most.*' This was repealed by the Statute Law Revision Act, 1887.

<sup>1</sup> 16 Car. II, c. 1.

The fourth is 6 Will. & Mary, c. 2, still in force, which provides :—

‘That within three years at the farthest from and after the dissolution of the present Parliament, and so from time to time ever hereafter, within three years at the farthest from and after the determination of every other Parliament, legal writs under the great seal shall be issued by directions of your Majesties, your heirs and successors, for calling, assembling and holding another Parliament.’ Triennial summons.

It would seem then that, apart from the general expression of the Act of Edward III, the only statutory securities which we have ever possessed for the frequent summons and sitting of Parliament are the Act of Charles II, providing that Parliament shall sit at least once in every three years, and the Act of William and Mary to the effect that we shall not be more than three years without a Parliament. Statute does not secure annual sessions,

Nor do the Statutes say what is to happen if the Crown fails to carry them into effect. The Long Parliament devised machinery to meet such a case, but subsequent Parliaments appear to have thought it disloyal to provide for the contingency that the Crown might not fulfil the Law.

It is sometimes said that the necessities of supply compel the Crown to an annual summons of Parliament. But, as I pointed out in speaking of the Committee of Ways and Means, much of our taxation is now permanent, and government might fairly be carried on for a while without those annual taxes which every session increases or diminishes. nor does the need of supply;

It is not the need of supply, but of the appropriation of supply and of the Army Act, which makes it legally necessary for Parliament to sit every year. If Parliament did not appropriate the supplies of the year to specific purposes, the money which is provided by taxation could not legally be paid out to meet the services of the year, except in the case of those charges upon the revenue as are permanently authorized by statute. The interest upon the national debt would be paid, but not the wages of but of appropriation of supply;

sailors serving on board of His Majesty's ships, nor the regimental pay of His Majesty's land forces. The salaries of the judges would be paid, but not the salaries of the civil service, or the bills for furniture and repairs in the offices of the public departments. Enough money would come in to meet some, though not all, of these charges, but the authority to pay three-fourths of the nation's liabilities would be wanting, and there would be no one in the kingdom who could make the payments without committing a breach of duty<sup>1</sup>.

and of the  
Army Act.

And the absence of any authority to pay the officers and men in His Majesty's army would not be the only difficulty which the army would occasion if the sitting of Parliament should be intermitted for a year. The existence of a standing army in time of peace is contrary to law. It is legalized each year, for a year, by the Army Act. Again, the punishments and procedure for the maintenance of discipline in a large body of troops are contrary to the common law of the land, as declared by several statutes. They, too, are legalized by the Army Act which brings into force each year, for a year, a code of military law<sup>2</sup>. These are the only practical securities for the summons of Parliament with tolerable frequency, but they neither impose any penalty nor supply any alternative machinery in case the Crown should make default in fulfilling the Statutory requirements as to the issue of writs of summons.

The prerogative of  
dissolu-  
tion.

The prerogative of dissolution gives rise to difficult and intricate questions.

The right of the King to dissolve Parliament is unquestionable; in fact one may say that, within the limits of the Septennial Act, the King holds the life of a Parliament in his hands. But for a dissolution of Parliament effected by the sovereign *proprio motu* without the advice or against the advice of his ministers we must go back to the days before responsible government. Macaulay<sup>3</sup> describes William III, in 1701, hesitating as to the pros-

<sup>1</sup> See vol. ii, part ii, ch. vii, sect. ii. § 4.

<sup>2</sup> Ibid. pp. 182, 183.

<sup>3</sup> History of England, v. 293.

pects of a dissolution, deciding finally, on his own responsibility, to dissolve, in the expectation that a Whig majority would be returned and that he would be able, once more, to employ the ministers in whom he trusted. We see here the prerogative exercised in complete independence of ministerial advice. But whether the King should grant or refuse a dissolution when asked by his ministers to dissolve is a matter of comparatively recent discussion.

It is plain from the Letters of Queen Victoria that Lord Melbourne had conveyed to the Queen's mind an impression that a dissolution of Parliament did not mean so much an appeal by ministers to the country for approval of their policy, as an appeal by the Queen to the country on behalf of her ministers. He is reported by the Queen in 1841 as saying that the return of a majority in favour of the Opposition would be 'an affront to the Crown'.<sup>1</sup> And Queen Victoria reaffirms this principle in a letter to Lord John Russell, who had suggested a dissolution in 1846<sup>2</sup>; she speaks of the power of dissolving Parliament as 'a most valuable and powerful instrument in the hands of the Crown, but one which ought not to be used except in extreme cases, *and with a certainty of success*. To use this instrument and be defeated is a thing most lowering to the Crown and hurtful to the country.'

Ministers  
and the  
claim of a  
dissolu-  
tion

Later she received advice of a different character from that given by Lord Melbourne.

In 1858 Lord Derby, when threatened with a vote of censure in the House of Commons, asked the Queen's leave to say that if the vote was carried Parliament would be dissolved. The Queen naturally declined to allow a threat to be uttered which would have brought in her name to influence debate, but she also consulted Lord Aberdeen on the point. His advice was instructive, for while he expressed no doubt as to the right of the Queen to refuse a dissolution to her ministers on her own responsibility, he points out that if such ministers asked for a dissolution as an alternative to resignation—that is, if the vote of censure had been carried and Lord Derby had then asked

as an alter-  
native to  
resigna-  
tion.

<sup>1</sup> Letters of Queen Victoria, i. 348.

<sup>2</sup> Ibid. ii. 108.

the Queen to dissolve—her refusal would have been tantamount to a dismissal, and the successors of the ministry would be responsible for what had taken place and would have to defend it in Parliament. In fact he says that 'he had never entertained the slightest doubt that if the minister advised the Queen to dissolve, she would, as a matter of course, do so'.<sup>1</sup>

The Crown  
does not  
refuse.

This seems to have been the view of the matter accepted by Queen Victoria in the subsequent years of her reign, and it is of considerable importance in relation to party politics.

Effect on  
Parlia-  
mentary  
discipline.

If a minister is certain that Parliament will be dissolved as a matter of course on his request, there is no reason why he should not announce his intention to ask for a dissolution, and use his announcement to influence waverers in an approaching party division or followers who are slack in attendance and support.

In fact the power of dissolution is a formidable disciplinary weapon in the hands of a Prime Minister, and becomes more formidable as the rapidly changing opinions of the modern electorate make the prospect of a general election more unwelcome to the member who values his seat.

When  
should  
claim be  
made?

We may say then that the prerogative of dissolution is one which the King exercises on the advice and at the request of his ministers and that a request is not refused. It remains to consider when this request may properly be made.

Shortly it may be said that a dissolution is rightly demanded whenever there is reason to suppose that the House of Commons has ceased to represent the opinion of the country.

1895.

If a Prime Minister who has a majority in the House of Commons resigns after a casual defeat, as did Lord Rosebery in 1895, or resigns because he considers that his programme is exhausted, as did Mr. Balfour in 1905, his successor can only take office on the understanding that Parliament will be dissolved at the earliest opportunity so

1905.

<sup>1</sup> Letters of Queen Victoria, ii. 108.

as to afford the country a means of expressing its opinion on the new ministry.

If a minister is defeated in the House of Commons on a measure which he believes will be acceptable to the country, he may appeal to the electors to decide between him and the House of Commons. This is what was done by Mr. Gladstone in the case of the Home Rule Bill of 1886.

1886.

Or again a series of by-elections adverse to a Government may incline a minister to dissolve in order to obtain an expression of opinion from the country. Such was the action of Mr. Gladstone in 1874.

1874.

These are the usual grounds on which a dissolution is demanded, but they represent different forms of the same proposition, namely, that a dissolution is rightly demanded if there is reason to suppose that the House of Commons and the majority of the electorate are at variance.

Some doubtful points may be noted.

When any large change is made in electoral conditions, as in 1832, in 1867-8, and in 1885, it is proper that those new conditions should be put to the test and the newly enfranchised enjoy their new rights at the earliest opportunity. As soon, therefore, as the machinery is perfected, a dissolution takes place. But it happened both in 1868, and in 1885, that, while Parliament was still engaged in perfecting this machinery, the Government of the day suffered defeat in the House of Commons. Mr. Disraeli in 1868 retained office until the result of a general election was ascertained; Mr. Gladstone in 1885 resigned, Lord Salisbury took his place, and, with his colleagues, though in a minority in the House of Commons, wound up the business of the session, and governed the country until defeated in the new Parliament.

Doubtful cases.  
Change of electoral conditions.

Each case presented difficulties of the same sort. The House of Commons could not be relied on to support the Government, the Government, not unnaturally, doubted whether the House was in accord with the country, but to dissolve and appeal to the old constituencies using the old machinery when it was certain that a new House of

Commons would have little to do except perfect that machinery and then make another appeal to the constituencies, would have been waste of time, trouble, and money.

The  
mandate.

The necessity of appealing to the country as soon as possible after a change in electoral conditions stands on a very different footing from the modern theory of 'the mandate.' According to some political thinkers no novel or important legislative measure ought to be introduced in Parliament unless it has been brought prominently to the notice of the constituencies at a previous general election.

Doubtless at some general elections some great changes have been definitely and prominently placed before the electors, notably the disestablishment of the Irish Church in 1868 and the extension of the franchise in 1880. But there is also no doubt that other very important measures have been introduced into Parliament with no such preparatory consideration. Many instances could be found in earlier days; perhaps the most striking in recent times is the Home Rule Bill of 1886, which was certainly no part of Mr. Gladstone's programme at the general election of 1885.

The question was frequently raised in regard to the Parliament of 1900, which was returned, as was alleged, to enable the Unionist Government to conclude the war in South Africa, but which was afterwards invited to pass, and did pass, important bills dealing with education and licensing.

It is enough to state the theory without further comment. The chiefs of either party can always guard themselves against the charge of acting without a mandate, by an extension of their programme to include all the matters on which they may desire to legislate; and unless the *referendum* is to become part of the law of the land, it is necessary that the electors must repose some general confidence in those whom they send to represent them.

The King  
retains the  
prerogative.

The direct action of the Crown in causing or refusing a dissolution may be said to have ceased; but the prerogative exists. Where the King has thought that his

ministers and his Parliament were alike out of harmony with the country he has dismissed his ministers, as George III did in 1783, or promoted if not suggested a change of Government as William IV did in 1834, and has then granted a dissolution when his new ministers asked for one. George III proved to be right in gauging the opinion of the country. William IV was premature. The cases serve to remind us that the prerogative might conceivably be a resource where a Ministry and House of Commons were alike out of harmony with the country and were unwilling to admit the fact.

### § 2. *The Crown in communication with Parliament.*

The Crown, if it desires to communicate with either House of Parliament, can only do so by speech from the throne at the opening and close of session or by message in one form or another. For though the King is entitled to be present on his throne during the debates in the House of Lords, he might not take part in them. The speech from the throne which opens and concludes the business of Parliament was formerly an address to both Houses delivered in person, and capable of being charged with exhortation or rebuke adapted to the prospects or the history of the session. These speeches now contain formal statements as to the foreign relations of the country, communications of topics of legislation to be proposed by ministers, remarks on the condition of trade, on the weather in connection with the harvest, and, at the close of the session, expressions of thanks for the supplies granted and congratulations on the additions to the statute-book which the labours of the session have produced.

The presence of the King at the sittings of the House of Lords in the mediæval Parliaments appears to have been very common<sup>1</sup>. The decision of Henry IV, relating to the right of the Commons to the exclusive dealing with supply, is called the 'Indemnity of the Lords and Commons'<sup>2</sup>, and in so far as it contains a permission to the Lords to

Speech  
from the  
Throne.

Royal  
presence  
in the  
House of  
Lords.

*Ante*,  
p. 269.

<sup>1</sup> Stubbs, *Const. Hist.* iii. 480.

<sup>2</sup> *Rot. Parl.* iii. 611.



transact business in the absence of the Crown, it suggests that the House of Lords in the reign of Henry IV still retained so much of the character of the King's Council as to make the presence of the King necessary to the due transaction of its business.

But, however this may be, the practice had become so unusual by the reign of Charles II, that the Lords were uncertain what business of the House could be transacted in his presence. On one occasion Charles came unexpectedly into the House when it was sitting in Committee, and thereupon the sitting of the House was resumed. But the King said 'that he is come to renew a custom of his predecessors long discontinued, to be present at debates but not to interrupt the freedom thereof: and therefore desired the Lords to sit down, and put on their hats, and proceed with their business.' Whereupon 'the Lords again taking their places and putting on their hats the House was again adjourned into a Committee during pleasure <sup>1</sup>.'

Charles II was a frequent attendant at debates, being present at as many as forty-three out of eighty-nine in the session of 1672-3, and upon one occasion in the session of 1671 he rebuked the Lords for their disorderly conduct, desiring them 'not to prophane such a presence as this with the like disorder, but keep their places and proceed in businesses according to their orders prescribed in the House <sup>2</sup>.'

Since the death of Queen Anne the presence of King or Queen during debates in Parliament has been discontinued. The ceremonies of opening, prorogation or dissolution of Parliament, and of giving the royal assent to bills are the only occasions on which the King is present in the House of Lords.

In the  
Commons.

His presence during a debate in the House of Commons would be something very different from a revival of a practice long disused. Charles I is the only sovereign <sup>3</sup>

<sup>1</sup> 12 Lords' Journ. 318.

<sup>2</sup> 12 Lords' Journ. 413.

<sup>3</sup> Gardiner, *History of England*, x. 139. But Dr. Stubbs (*Lectures on Mediaeval and Modern History*, p. 281) describes how in 1532 Henry VIII drove the Annates Bill through Parliament by two visits to the Lords

who has thus ventured to violate the rights of the Commons to freedom and secrecy of debate. The Journals of the House for the 4th of January, 1642, contain the only authentic record of a situation incompatible alike with the dignity of the Crown and the privileges of the Commons.

The entry of the preceding business is interrupted, and the report runs:—

His Majesty came into the House and took Mr. Speaker's chair.

‘Gentlemen,

‘I am sorry to have this occasion to come unto you.’ . . .

The journal breaks off abruptly, and its silence is significant<sup>1</sup>.

The Crown therefore, except on the occasions which I have mentioned, must communicate with the Houses by messages, and these may be either formal, under the sign manual delivered to the Lord Chancellor in the one House, and to the Speaker in the other, and received by members uncovered: or of a less formal character, but reported verbatim by a minister or officer of the household to the House of which he is a member: or lastly, it is permissible for a minister to communicate to the House in the course of debate a statement from the Crown, but this only ‘if it relates to matters of fact, and is not made to influence the judgment of the House, and then only with the indulgence of the House<sup>2</sup>.’

Apart from these modes of address, the Crown has no means of communicating with Parliament. Nor are these used except upon formal occasions. The King can direct the attention of the Houses to certain matters in his opening speech. He can while they are sitting communi-

and one to the Commons. There the voices went against him and he insisted on a division, an exceptional practice at that time. Dr. Stubbs kindly referred me to the *Domestic State Papers*, Henry VIII, vol. v, no. 898. Here it may seem doubtful whether the King came to the House or summoned the Commons to his presence: but there is authority for similar action taken, in 1535, by the same determined monarch. Ilbert, *Legislative Methods and Forms*, ch. v, p. 77.

<sup>1</sup> *a* Com. Journ. 368.

<sup>2</sup> Hansard, 3rd Series, vol. ccxxviii, p. 2037.

Use of  
King's  
name in  
debate.

cate a request for supply, or place at the disposal of the country some matters of royal interest or prerogative; he can, at the close of the session, if he choose, comment upon the conduct of business and the progress of legislation. All measures introduced or advocated by the King's ministers are assumed to have the royal approval, but to introduce into debate in either House any allusion to the personal wishes of the King, or to use His Majesty's name in such a manner as to influence the judgment of members, is contrary to the rules of the Houses.

Thus during the session of 1876 a member of the House of Commons made at a public meeting a statement to the effect that a measure then before the House had been brought forward in deference to the personal wishes of the Queen. Mr. Disraeli, who was then Prime Minister, desired to contradict this statement on behalf of the Queen and with her authority. He said, 'I can only speak with the indulgence of the House. I have the authority of Her Majesty to make a statement on her part, but at the same time, as I have felt it my duty to place before Her Majesty the fact that it is not in accordance with the rules of the House that the name of the Sovereign can be introduced into debate without the permission of the House—it therefore rests with the House whether I shall go on. If the House desires it I shall do so.'

Mr. Speaker thereupon said, 'As the House is aware, one of the rules of the House is this—that the introduction of the Queen's name into debate, with a view to influence the decision of the House, would certainly be out of order. At the same time, if the statement of the right honourable gentleman relates to matters of fact, and is not made to influence the judgment of the House, I am not prepared to say that, with the indulgence of the House, he may not introduce Her Majesty's name into the statement<sup>1</sup>.'

The House is the ultimate authority in the matter, and may set aside its own conventions, if it so please, and if occasion require.

<sup>1</sup> Hansard, 3rd Series, vol. cccxviii, p. 2037.

§ 3. *The Crown as a party to Legislation.*

We have still to consider the action of the Crown as a party to legislation, and looking back at the history of this matter, and noting, as we have had to do, the large share of legislative power which the Crown once possessed, we are apt to forget that laws have been passed to which no royal assent was given; we are apt to forget the episode of the Commonwealth; the restoration of Charles II; the resolution of the Lords and Commons that the crown should be offered, on the abdication of James II, to William and Mary; the strange conclusion at which Lord Chancellor Thurlow arrived during the insanity of George III, in 1788, that he could put the great seal to a Royal Commission empowering him to give the royal assent to Acts of Parliament.

We may leave out of consideration the makeshifts to which constitutional lawyers may be reduced when the throne is vacant or its occupant insane. All that can be done under such circumstances is to supply, as soon as may be, the deficiency in the constitution. Apart from catastrophes which need to be dealt with as may best suit the circumstances of each case, we may safely join with the second Parliament of Charles II in holding that there is no truth in the 'opinion that both Houses of Parliament, or either of them, have a legislative power without the King,' an opinion the expression of which rendered its holder liable, by the same statute, to the penalties of a *praemunire*.

When a bill has passed through all the necessary stages which I have described above, it is ripe to receive the royal assent, and this assent is given by the King in person or by commission.

If the King should come to Parliament in person, every bill which is ready for the royal assent would necessarily be presented to him for assent or rejection, and could not be withheld. In the same manner, when a commission is issued to give the royal assent, every bill which is ready

should be included in a schedule annexed to the commission. No bills are allowed to reach their final stage, after a commission has been issued, until it has been acted upon, for otherwise the commission would need to be altered so as to include them.

It seems to have been regarded as doubtful at one time whether the Crown by assenting to a single bill did not thereby terminate the session of Parliament<sup>1</sup>, and as late as 1670 a clause was inserted into an act providing that 'His Majesty's royal assent to this bill shall not determine this session of Parliament<sup>2</sup>.' But the doubt has been cleared up without express enactment or decision upon the point, and the royal assent is now given to bills as soon as they are ready to receive it. The validity of the royal assent by commission is certified by 33 Henry VIII, c. 21, the Act for the attainder of Queen Catherine Howard. It is declared in that Act—

formal  
requisites.

'That the King's royal assent by his letters patent under his great seal *and signed with his hand*, and declared and notified in his absence to the Lords spiritual and temporal and to the Commons assembled together in the high house, is and ever was of as good strength and force as though the King's person had been there personally present and had assented openly and publicly to the same.'

And also—

'That this royal assent and *all other royal assents hereafter to be so given* by the Kings of this realm and notified as aforesaid, shall be taken and reputed good and effectual to all intents and purposes without doubt or ambiguity; any custom or use to the contrary notwithstanding.'

The provisions of this Act are followed, and the commission is under the sign manual as well as the great seal. The only departure from the law on this subject was in the case of the Regency Bill of 1811, when George III was incapable of expressing any rational intention, and a commission was nevertheless sealed for the purpose of giving his assent to the bill.

<sup>1</sup> Gardiner, *History of England*, iv. 127.

<sup>2</sup> 22 & 23 Car. II, c. 1.

There are three forms of expressing the royal assent to a bill. A public bill is made law by the expression of the royal assent in the same form as that in which the kings of the fourteenth century were wont to reply to petitions for legislation. A favourable answer was couched in the words 'le roy le veult'; but if the King was unwilling to legislate he was also anxious not to offend by a curt refusal, and he 'smiling put the question by' with the words 'le roy s'avisera.'

These words, which amount to a veto upon legislation, have been seldom used since legislative procedure assumed its modern shape, save in the reign of William III.

The frequent use of this veto by William III was probably due to the recent limitations imposed by the Bill of Rights on the suspending and dispensing power. His position differed in some respects from that of his predecessors and successors.

The Tudor monarchs, with their packed Parliaments, ran no great risk of being asked to assent to legislation of which they disapproved, although Elizabeth exercised the right of rejecting bills on at least one occasion very freely<sup>1</sup>. The Stuarts, with their exalted ideas of the prerogative, might readily assent to legislation from which they held themselves entitled to be set free by the use of the dispensing and suspending powers.

If, on the other hand, the King in modern times disapproved of proposed legislation, he would begin his opposition earlier. He can inform his ministers that a bill which they intend to propose is distasteful to him, and that he cannot entertain it. If the ministers insist upon their measure he can dismiss them and employ others, in the hope that those others may be supported by Parliament. He thus appeals from his ministers to Parliament. If Parliament, in its desire for this particular measure, refuses its confidence to the new ministers, and puts them in a minority on divisions upon important questions, the King has one more resource. He can dissolve Parliament and

<sup>1</sup> Parl. Hist. i. 905.

appeal to the country. If the constituencies return a new Parliament pledged to the measure of which the Crown disapproves, this last resource has failed. It remains for the Crown, in the words of Lord Macaulay, 'to yield, to abdicate, or to fight.'

its use by  
Will. III.

William III had neither a packed and submissive Parliament, nor a dispensing power, nor yet a responsible Ministry. He could not through ministers make his wishes felt in the inception of a bill, and being bound to observe the laws to which he assented, he chose to be circumspect in giving his assent. To a nation used to the arbitrary dealings of the Stuarts, the use of his veto by William was not regarded as a violation of constitutional usage. This may account for the fact that his refusal to assent to measures so important as the Place Bill and the Bill for Triennial Parliaments, when they first were presented to him, did no more than cause disappointment. But in this respect his reign must be regarded as a transition period. Anne exercised the veto once, when in 1707 she refused her assent to the Scotch Militia Bill. Since then the words 'le roy s'avisera' have never been used.

(b) To a  
private  
bill,

A private bill receives the royal assent in a different form, suggesting its character as a private petition, by the words '*soit fait comme il est désiré.*'

or claim  
of right.

A claim of right is granted in a form very nearly similar to this. The Petition of Right received the assent of Charles I in the words '*soit Droit fait comme il est désiré.*' The Petition was a claim of Public Right, and the answer given in these terms constituted the Petition a declaratory Statute.

(c) To a  
money  
bill.

A money bill is a grant of supply or an appropriation of supply granted by the Commons to the Crown, and it needs for its efficacy the assent of the Lords and the Crown. The form of assent to such a bill is '*Le Roy remercie ses bons sujets, accepte leur b n volence et ainsi le veut.*'

The process of giving the Royal assent by Commission

may be illustrated by an extract from the Journal of the House of Lords for the year 1880.

The Lord Chancellor, on the 7th of September in that year, acquainted the Lords that 'Her Majesty had been pleased to issue a Commission to several Lords therein named for declaring Her Royal assent to several Acts agreed upon by both Houses of Parliament.'

The Lords Commissioners sent to desire the attendance of the Commons, and the Commons attended with the forms described in a preceding chapter, the Speaker bringing with him the Appropriation Bill. Then the Lord Chancellor said:—

'My Lords and Gentlemen of the House of Commons,

Her Majesty not thinking fit to be personally present here at this time, has been pleased to cause a Commission to be issued under the Great Seal, and thereby given Her Royal Assent to divers Acts which have been agreed upon by both Houses of Parliament, the titles whereof are particularly mentioned; and by the said Commission hath commanded us to declare and notify Her Royal Assent to the said several Acts in the presence of you the Lords and Commons assembled for that purpose: which Commission you will now hear read.'

The Commission was thereupon read, and the schedule containing the titles of the Acts to which assent was to be given, and the Lord Chancellor then spoke again:—

'In obedience to Her Majesty's commands and by virtue of the Commission which has been now read, we do declare and notify to you the Lords Spiritual and Temporal, and Commons in Parliament assembled, that Her Majesty hath given Her Royal Assent to the several Acts in the schedule to the Commission mentioned: and the Clerks are required to pass the same in the usual form and words.'

Then the Clerk of the Parliaments, having received the Money Bill from the hands of the Speaker, brought it to the table, where the Clerk of the Crown read the titles of that and other Bills to be passed, severally as follows, viz.:—



**'Appropriation Act 1880. (Sess. 2.)**

To this Bill the Royal assent was pronounced by the Clerk of the Parliaments in these words, viz. :

*"La Reyne remercie ses bons sujets accepte leur benevolence et ainsi le veult."*

Then the Clerk of the Crown at the table read the titles of the Bills to be passed severally, as follows, viz. :

Post Office (Money Orders) Act 1880.

Doctors' (Scotland) Act 1880.

(and a number of others.)

To these Bills the Royal assent was pronounced by the Clerk of the Parliaments in these words, viz. :

*"La Reyne le veult."*

Lord Plunket's Indemnity Act 1880.

To this Bill the Royal assent was pronounced by the Clerk of the Parliaments in these words, viz. :

*"Soit fait comme il est désiré."*

In 1876 a question was raised as to the validity of a royal assent given by commission while the Queen was on the continent. A statute of the 2nd William and Mary had given efficacy to 'acts of royal power' done by the King during his absence from the realm; and it was not considered necessary to create Lords Justices with delegated powers or to legislate afresh upon the subject<sup>1</sup>.

Until 1793 an Act of Parliament commenced its operation from the first day of the Session in which it was passed. The Statute 33 Geo. III, c. 13 provided that the date on which a Bill received the royal assent should be endorsed upon it by the Clerk of the Parliament, and that 'such endorsement shall be taken to be part of such Act and to be the date of its commencement, where no other commencement shall be therein provided.' It is usual now to provide in the bill for the date at which it shall come into operation, and the date may vary, one part of a bill may come into operation sooner than another, or the commencement of its operation may be made to depend upon various conditions, such as the action, within prescribed limits, of local authorities.

<sup>1</sup> May, *Parl. Practice* (ed. 11), p. 515.

The area of Parliamentary sovereignty is co-extensive with the dominions of the Crown, and as regards crime, may cover offences committed by British subjects outside the King's dominions: but an Act of Parliament is presumed to extend to the whole of the United Kingdom, and not beyond, unless words are expressly used to extend or to limit its scope<sup>1</sup>.

<sup>1</sup> Ilbert, *Legislative Methods and Forms*, pp. 250, 275, 276.

## CHAPTER VIII

### THE EXECUTIVE AND LEGISLATURE IN CONFLICT

I HAVE described the constitution of our Parliament, and its action in Legislation. It may be a matter of interest, though that interest is almost entirely historical, to note the direct invasion of the rights of Parliament by the Crown in the sixteenth and seventeenth centuries; and the indirect but none the less potent influence brought to bear upon the legislature by the executive when the door of direct encroachment had been closed by statute.

The Crown, as being at once the executive and a branch of the legislature, is also that branch of the legislature which at one time assumed to itself legislative powers which were incompatible with the sovereignty of Parliament, at another has endeavoured to obtain by influence those powers which statute had taken away.

The Crown has (1) tried to legislate independently of Parliament; it has (2) tried to nullify legislation effected in the entire Parliament by dispensing with the operation of statutes in individual cases, or (3) by suspending their operation altogether; it has (4) tried to raise money without parliamentary grant; it has (5) tried, personally or through its ministers, to influence the legislature by the corruption of members or the corruption of constituencies.

#### § 1. *Royal Proclamations.*

The assumption by the Crown of independent legislative powers found some warrant in the identity, in early times, of the executive and the legislature, and in the very gradual definition of the functions of the King in Council

and the King in Parliament. Legislation by way of Ordinance continued for some time after Parliament had acquired legislative power, and often with the sanction and approval of Parliament. I have spoken of the legislative character of the ordinance as distinguished from statute, and of the jealousy with which this form of legislation came to be regarded. This quickened as the confusion between the Executive and the Legislature cleared away, and as Parliament, and especially the Commons, realized the importance of insisting upon the observance of the terms of the Statute of Edward II, whereby the consent of prelates, earls, barons, and the commonalty of the realm was required to matters which were to be established 'for the estate of the king, the realm, and the people.'

*Ante,*  
P. 244.  
Legisla-  
tion by  
ordinance,

Legislation by ordinance, which had been denounced at the end of the fourteenth century, disappeared during the fifteenth, but revived in the sixteenth in the form of legislation by Royal Proclamation.

revived in  
Proclama-  
tion.

The modern form of Proclamation has already been set forth in an earlier part of this book, but the Proclamations of the Tudor sovereigns were a great deal more than ministerial acts summoning or proroguing Parliaments, or exercising powers conferred upon the Crown by Statute. They made new laws, new offences, new punishments; and the offences were tried and the punishments inflicted by the Court of Star Chamber.

Henry VIII, who was skilful in extending the discretionary prerogative by legal means, and in obtaining from Parliament an increase of powers which it was the duty of Parliaments to control, procured in 1539 the passing of the Statute of Proclamations<sup>1</sup>. The statute recited the inconvenience and risk of waiting for Parliament to deal with cases which needed prompt action. The laws and customs of the realm, and the person and property of the individual were professedly guarded: but the Act provided that Proclamations made by the King, with the advice of his honourable council, or of a majority of his council, 'should be observed and kept as though they were

Statute of  
Proclama-  
tions.

<sup>1</sup> 31 Hen. VIII, c. 8.

made by an Act of Parliament,' and permitted the enforcement of these proclamations by such pains and penalties as the King and Council might deem requisite. Such an Act was, as Dr. Stubbs describes it, 'a virtual resignation of the essential character of Parliament as a legislative body; the legislative power won for the Parliament from the King was used to authorize the King to legislate without a Parliament<sup>1</sup>.'

Proclama-  
tions  
under Ed-  
ward VI.

The Statute of Proclamations endured but for a short time; it was repealed by 1 Edward VI, c. 12, s. 5, but the practice continued, and though royal proclamations had no longer a statutory force, they were used to introduce ecclesiastical changes and social and economic regulations; they were enforced by penalties of fine, imprisonment, and even slave labour on the galleys<sup>2</sup>. In the reign of Mary the validity of such proclamations was called in question, and the judges at once assigned to them their true legal character as statements of existing law, and not sources of new law.

Mary.

'The King, it is said, may make a proclamation *quoad terrorem populi* to put them in fear of his displeasure, but not to impose any fine, forfeiture or imprisonment; for no proclamation can make a new law, but only confirm and ratify an ancient one<sup>3</sup>.'

Nevertheless the Tudor queens continued to legislate by way of proclamation more freely than the kings of the fourteenth century had ever ventured to do by ordinance.

Elizabeth.

Impositions were laid upon imported goods, sumptuary rules were made as to the building of houses, and the quality of apparel; trade regulations were enforced by punishments in excess of those which the common law would have inflicted.

James I.

James I followed the same course. In the proclamation by which he summoned his first Parliament he tried to limit the choice of the electors by describing the quality of the candidates to be elected, and the discretion and

<sup>1</sup> Stubbs, Const. Hist. ii. 588.

<sup>2</sup> Hallam, Hist. of England, i. 37.

<sup>3</sup> Ibid. i. 337.

duties of the sheriff by a charge that writs were not to be sent to ancient or depopulated towns. By proclamations also he levied impositions on merchandise; a matter which will recur later. He interfered in various ways with personal liberty and freedom of trade<sup>1</sup>, bidding country gentlemen to leave London and go and maintain hospitality in their own houses, forbidding the increase of buildings about London, and the making of starch out of wheat. But at this point Coke was consulted as to the legality of these proclamations; he asked leave of the Council to confer with some of his brethren on the Bench, and three judges were appointed to assist him. The result of their consideration may be regarded as final:—

Judicial  
opinion  
on their  
validity,  
1610.

‘1. The King by his proclamation cannot create any offence which was not one before; for then he might alter the law of the land in a high point; for if he may create an offence where none is, upon that ensues fine and imprisonment.

‘2. The King hath no prerogative but what the law of the land allows him.

‘3. But the King, for the prevention of offences, may by proclamation admonish his subjects that they keep the laws and do not offend them, upon punishment to be inflicted by law: the neglect of such proclamation aggravates the offence.

‘4. If an offence be not punishable in the Star Chamber the prohibition of it by proclamation cannot make it so<sup>2</sup>.’

Here are set forth in a few words some salient features of our Constitution: and this at a time when a clear statement of the points at issue between Crown and Parliament was greatly needed, and when the first step to be taken towards a settlement of constitutional difficulties was that the nature of those difficulties should be understood.

Constitutional  
value  
of the  
opinion.

The King's prerogative is ascertainable by rules of law, and is limited by those rules; he cannot make new nor alter existing laws, nor create new offences, nor constitute

<sup>1</sup> For specimens of such proclamations, see Rymer; Old edition, xvii. 417, 607; Hague edition, vol. vii, part 4, pp. 16, 143.

<sup>2</sup> 12 Co. Rep. 74, 75.

new courts for the trial of offences otherwise provided for. He is the executive, his business is the enforcement of existing law. If he thinks he can best enforce it by proclaiming it, he is welcome to do so. The judges in awarding sentence upon offenders against the law so proclaimed may fairly consider that the warning aggravates the offence.

Limita-  
tion of  
preroga-  
tive.

If one asks where is the law to be found by which the King's prerogative is determinable, the answer is 'in statutes, in judicial decisions, in the customs of the realm.' If one asks what power in the State can do that which Coke says the King can not do, the answer is that the Crown in Parliament can make, unmake, and alter the law which it is the duty of the Crown in Council to administer.

16 Car. I,  
c. 10.

The indefinite jurisdiction of the Star Chamber was at this moment one of the open questions of the Constitution, and in this matter Coke goes no further than to say that, whatever that jurisdiction may be, it cannot be increased by the method of proclamation. But in fact, so long as the Star Chamber continued to exist it was difficult to prevent the enforcement of proclamations by some form of penalty. When this jurisdiction had been abolished by the Long Parliament, and there remained only the regular tribunals before which it was possible to try offenders against the proclamations of the Crown, the *dicta* of Coke and his brethren came to correspond not merely with the law as it was, but with the law as it was observed, and we hear little more of this encroachment of the prerogative on the rights of Parliament.

Illustra-  
tions of  
legal and  
illegal  
proclama-  
tions.

An episode of the eighteenth century furnishes an excellent illustration of the difference between legal and illegal proclamations.

Proclama-  
tion by  
way of  
admonition.

When Lord Chatham and his colleagues took office in the summer of 1766 the ministers of the Crown thought themselves bound to take measures in view of the great scarcity occasioned by a bad harvest. By their advice two Royal Proclamations were issued.

There were on the statute-book certain laws against forestallers and regraters, persons who bought up corn and kept it back to get a high price, or who carried corn from

one part of the country to another in order to take advantage of better prices where the corn was scarcer. Whatever may have been the economical merit of these laws, the Crown was within its rights in proclaiming them and the penalties for the breach of them. A proclamation of these statutes was just such an admonition 'for the prevention of offences' as came within Coke's description of a legal exercise of the prerogative.

But the ministry went further. Without waiting for the summons of Parliament they advised the King to lay an embargo, by proclamation, upon all ships laden with wheat or wheat-flour. Such a restraint was contrary to the provisions of statutes, which made the export of corn free. When Parliament met, the ministers were severely attacked for having counselled the Crown to break the law, and it is to be noted that they did not for a moment attempt to defend the legality of the proclamation. They claimed to have acted for the best on an emergency, and Lord Camden said that 'it was but a forty days' tyranny.' After acrimonious debates an Act of Indemnity was passed in favour of the ministers who had advised and the officials who had carried out the embargo.

The whole proceeding illustrates the difficulty which must recur from time to time, and which the Statute of Henry VIII proposed to meet. Ordinarily the law is sufficient for all circumstances that may arise, but there may be occasions when the executive must act in breach of the law. The Act of Henry VIII solved the difficulty by giving to the Crown in Council a discretionary legislative power. It is safer to allow the executive to act at its peril on the chance of an indemnity; and, though timid ministers may shrink from risk and responsibility when action is required, we must choose between inaction which may be a source of danger, and the greater danger of placing the Crown and its ministers above the law of the land.

The Forty  
Days'  
Tyranny.

Practical  
difficulty  
of subject.



§ 2 (a). *The Dispensing Power.*

Uses of the  
dispensing  
power.

The claim of the Crown to independent legislative power was never admitted, and, when called in question, was uniformly declared illegal, but the power to dispense with the operation of statutes seems, within certain limits, to have been acknowledged. It may have been of practical utility, for, as Hallam says<sup>1</sup>, 'the language of ancient statutes was usually brief and careless, with few of those attempts to regulate prospective contingencies, which, even with our pretended modern caution, are often so imperfect; and as the sessions were never regular, sometimes interrupted for several years, there was a kind of necessity, or great convenience, in deviating occasionally from the rigour of a general prohibition.' But he adds that more often some motive of interest or partiality determined the action of the Crown; and there seems no doubt that, in the mediaeval constitution, pardons or dispensations from the observance of statutes were granted in cases which did not demand a remedy for inconvenience or hardship.

Modes of  
exercise.

In 1347 the Commons petitioned against the grant of charters of pardon in great numbers of cases of murder, robbery, rape, and other felonies<sup>2</sup>; the King promised to use this prerogative henceforth for the honour and profit of the people, and to consider in Council the cases in which pardons had already been granted. In 1351 a like remonstrance was required. It is plain that pardon was given not after conviction but before indictment, and the prayer of the remonstrants was that common malefactors and murderers should be brought within the law for the quiet of the commonalty and the maintenance of the peace<sup>3</sup>.

Parliament endeavoured by an Act 13 Ric. II, stat. 2, c. 1 to restrain these grants by enacting that they should not be valid unless they specified the name of the offender and the precise character of the offence. The Courts of law also laid down rules limiting the dispensing power. They held that the King could not dispense with *mala in se*,

<sup>1</sup> Hallam, *Hist. of England*, iii. 60.

<sup>2</sup> Rot. Par. ii. 172.

<sup>3</sup> Rot. Par. ii. 229.

which were said to be violations of common law ; nor with statutes passed to prohibit *mala in se*, or in other words, to put common law into the form of a statute ; nor with the rights of individuals or corporations. But the power was very hard to define, and the difficulty may perhaps be best illustrated by two cases, both decided near the end of the seventeenth century. Illustrations.

The case of *Thomas v. Sorrell*<sup>1</sup> was an action brought for penalties for selling wines by retail contrary to the Statute 12 Car. II, c. 25.

An Act of the reign of Edward VI had forbidden the sale of wine by retail save with licences granted in certain forms by certain authorities. James I incorporated the Vintners' Company and gave them the right to sell wine by retail or in gross in and within three miles of the City of London, and in other places, *non obstante* the Statute of Edward VI.

The Statute of Charles II, which imposed fresh penalties on the sale of wine by retail, saved the rights of the Vintners' Company, of whom the defendant Sorrell was one.

The questions for the Court were, whether the patent of James I was void in its creation : if not, whether it expired when that king died ; if not, whether the saving clause of 12 Charles II, c. 25 saved it from the operation of that statute : and the Court had no difficulty in deciding that the patent had not expired and that the saving clause gave it a statutory sanction if the original dispensation was valid. *Thomas v. Sorrell.*

To the consideration of this point Vaughan C. J. devoted much learning and ingenuity. He distinguishes a *Dispensation*, or Licence (two terms which he seems to regard as convertible), as meaning the permission to do or to abstain from doing, which legalizes what it would otherwise be unlawful to do or leave undone, from a *Pardon* which frees, after conviction, from the penalties of wrongdoing. He rejects the distinction between *mala prohibita* and *mala in se* as confusing, and rightly so, for no act is legally

<sup>1</sup> Vaughan, 330.

*malum* unless forbidden by law. He denies the power of the Crown to dispense with any general penal law, and he endeavours to define the dispensing power by limiting it to cases of individual breaches of penal statutes where no private right is infringed, and where the breach is not continuous. The forfeiture in the case before the court was a part of the King's inheritance. No private right was therefore affected by the dispensation granted, nor was it contrary to the intention of the Act of Edward VI, which was not that no wine should be sold, but 'only that every man should not sell wine that would, as they might when the Act was made.' So 'the King could not better answer the end of the Act, than to restrain the sellers to freemen of London <sup>1</sup>.'

The judgment of Vaughan C. J. seems in substance to amount to this, that the King might dispense with an individual breach of a penal statute by which no man was injured, or with the continuous breach of a penal statute enacted for his exclusive benefit. We get all the learning of the time on the subject of the dispensing power, and are left with the impression that it was impossible to state the law in a clear and satisfactory form.

A more serious issue was raised by the case of *Godden v. Hales* <sup>2</sup>, where the King granted a dispensation for a continuous breach of a general penal statute passed in the interest of the Church of England.

Abuse of  
dispensing  
power.

The cause of action was debt for £500. The defendant, holding a military office under the King, had neglected to take the oaths of supremacy and allegiance and to receive the sacrament according to the rites of the Church of England as required by 25 Car. II, c. 2. For this he was indicted at the Rochester assizes in March 1686 and convicted, and the plaintiff became entitled to the forfeit of £500 as by the statute was provided. Sir E. Hales set up in defence letters patent under the Great Seal, received from the King before the date of the indictment, and discharging him from satisfying all or any of the tests prescribed by 25 Car. II, c. 2.

<sup>1</sup> Vaughan, 355.

<sup>2</sup> 2 Shower, 475.

The case was tried in the Court of King's Bench, but the opinions of all the judges were taken, and eleven out of twelve pronounced in favour of the King's right to dispense with the Act of Charles II. They did not trouble themselves with the nice distinctions discussed by Vaughan, but said boldly that the laws were the King's laws, that he might dispense with them as he saw fit, that he need render no account for so doing, and that no Act of Parliament could take away that power.

Whatever may be the technical difficulty of defining the King's dispensing power, there is none in distinguishing such cases as *Thomas v. Sorrell* and *Godden v. Hales*. In the one the King in the interest of trade granted a dispensation from penalties provided for his benefit; in the other the King in the interests of a religion which was not that of the nation set aside penal laws which had been passed for the security of the national religion.

There was no doubt that the King intended to put himself above the law, and, apart from all legal interpretations of the dispensing power, to set aside statutes as he pleased. He had announced to Parliament at the beginning of the session of 1685 that he proposed to employ certain persons not qualified by law to hold commissions in the army. The Commons had remonstrated, and had offered to introduce Acts of Indemnity for the benefit of such persons as the King might wish to employ and who fell under the disabilities created by 25 Car. II, c. 2, but they urged that 'the continuance of them in their employments may be taken to be a dispensing of that law without Act of Parliament, the consequence of which is of the greatest concern to the rights of all your Majesty's dutiful and loyal subjects, and to all the laws made for the security of their religion.'

The King replied with a rebuke to the Commons for their lack of confidence in him. The law was not clear, but it was evidently necessary to make it clear, and to limit the powers claimed by the King.

So thought the Parliament which passed the Bill of

Rights, for the dispensing power is therein dealt with in such a way as to preclude its further exercise.

It is declared and enacted:

(1) That the pretended power of dispensing with laws, or the execution of laws by regal authority, as it hath been assumed and exercised of late, is illegal.

(2) In s. 12, that from and after this present session of Parliament, no dispensation by *non obstante* of or to any statute, or any part thereof, shall be allowed, but that the same shall be held void and of no effect, except a dispensation be allowed of in such a statute, and except in such cases as shall be specially provided for by one or more bill or bills to be passed during this present session of Parliament<sup>1</sup>.

Effect of  
the Bill of  
Rights.

From these clauses of the Bill of Rights one may deduce the following propositions:—

That the dispensations granted by James II were illegal.

That there were dispensations of older date which the Bill of Rights was not intended to invalidate.

That from the date of the passing of the Bill of Rights no dispensation of any Statute or part of a Statute was to be valid unless Parliament made provision for the same in the terms of the Statute.

The words *non obstante* were merely the technical terms in which the Crown was in the habit of dispensing with statutes, and are equivalent to the words 'any article or clause in such or such a statute to the contrary notwithstanding': and the 'bill or bills to be passed' were never brought forward.

We may therefore say that any exercise of the dispensing power subsequent to the Bill of Rights must take place by authority of Parliament, not by the prerogative of the Crown, and that we must go back to some considerable time before 1688 to find cases of dispensations which would be held to be lawful.

This clause was not in the original Declaration of Right, but was inserted when the Bill of Rights came to be re-enacted by Parliament, December 16, 1689.

The *Case of Eton College*<sup>1</sup> (1815) furnishes an instance of such a dispensation. The Statutes of that College forbade the Fellows to hold any spiritual preferment in conjunction with a Fellowship in the College. Queen Elizabeth gave permission to the Fellows to hold benefices of a certain value without thereby forfeiting their Fellowships, 'any article or clause in the Statutes of our said College to the contrary notwithstanding.' It was argued that such a dispensation was saved by the words 'as it hath been assumed and exercised of late,' and that the Bill of Rights did not affect an assumption or exercise of the dispensing power which had taken place 100 years before. The fellows were allowed to take the benefit of the dispensation by the Visitor of the College acting on the advice of his assessors, Sir W. Grant and Sir W. Scott.

### § 2 (b). *The Suspending Power.*

The Stuarts claimed to use the dispensing power on other grounds than precedent or convenience. They claimed it because they held that the King was the source from which law emanated and possessed a discretionary prerogative which enabled him, whensoever he thought the interests of the kingdom demanded it, to vary or set aside the law of the land. On this ground had been based the decision of the Court in *Godden v. Hales*. In the year 1687 James II determined to act up to the estimate formed by the judges of his prerogative, to free himself from the necessity of granting dispensations in individual cases, and to suspend all the penal laws relating to religion.

'We do declare,' runs the celebrated Declaration of Indulgence, 'that it is our royal will and pleasure, that from henceforth the execution of all and all manner of penal laws in matters ecclesiastical, for not coming to church or for not receiving the sacrament, or for any other nonconformity to the religion established, or for or by the reason of the exercise of

The suspending power.

The Declaration of Indulgence.

<sup>1</sup> The case is reported by Mr. Williams (1816). The substance of it may be found in Broom, *Constitutional Law*, note to Seven Bishops' case.

religion in any manner whatsoever, *be immediately suspended*, and the further execution of the said penal laws, and every of them *is hereby suspended*.'

The declaration goes on to say that 'the oaths of supremacy and allegiance and also the several tests and declarations mentioned in the Acts of Parliament made in the twenty-fifth and thirtieth years of the reign of our late royal brother King Charles II shall not at any time hereafter be required to be taken declared or subscribed by any person or persons whatsoever who is or shall be employed in any office or place of trust either civil or military under us or in our government.'

The  
petition of  
the Seven  
Bishops.

The validity of the claim thus asserted came in a somewhat circuitous way before the law courts in the Seven Bishops' case. Six Bishops, together with the Archbishop of Canterbury, petitioned the King that he would not insist on the reading of this declaration by them and its distribution throughout their dioceses as had been ordered by the King in Council. For this they were tried in the Court of King's Bench as for a seditious libel, and the defence set up came to this—that the declaration of the King's intention to suspend the penal statutes respecting religion amounted to an expression of intention to break the law, and that loyal subjects might decently, and without seditious purpose, petition against the requirement that they should publish an illegal declaration.

Their petition alleged nothing that was false; it was not proffered with malice: if the King's action was illegal or doubtful in respect of legality the petition was not seditious. The chief justice, therefore, and the three judges instructed the jury that the only question before them was whether the legality of the declaration was so sure that to petition against it was seditious. On this point the judges were divided; two addressed themselves to the interpretation of the law, two to the furtherance of the King's wishes. Of the former Powell J. puts the matter in the clearest light:—

'If there be no such dispensing power in the King,' he says, 'then that can be no libel which they presented to the King,

which says that the declaration, being founded upon such a pretended power, is illegal. Now this is a dispensation with a witness. It amounts to an abrogation and utter repeal of all the laws; for I can see no difference nor know any, in law, between the King's power to dispense with laws ecclesiastical, and his power to dispense with any other laws whatsoever. If this be once allowed of, there will need no Parliament. All the legislature will be in the King, which is a thing worth considering, and I leave the issue to God and your consciences<sup>1</sup>.

It might be said that there were occasions when the dispensing power could be exercised with salutary effect; but the suspending power as claimed and used by James II was inconsistent with the very existence of a Parliament, as a legislature. The Lords and Commons might meet to vote supplies, to state grievances, to criticize the ministers of the Crown, but it would be idle for them to make laws which the King could at any moment set aside. The Bill of Rights accordingly made short work of the suspending power, enacting:—

‘That the pretended power of suspending of laws or the execution of laws, by regal authority, without consent of Parliament, is illegal.’

### § 3. *Taxation.*

The claim of the Crown to levy taxes without consent of Parliament is very closely associated with the claim to legislate independently of Parliament. For it was only by keeping a firm hold upon the sources of supply that the Commons were able to control legislation.

I do not propose here to give an account of the sources of royal revenue, but of the respective claims of Crown and Parliament to demand the money of the people for the needs of government. The story of the controversy is so well told in the two great seventeenth-century cases that

Nature of  
the dis-  
cussion.

<sup>1</sup> 12 St. Tr. 183.

<sup>2</sup> 1 Will. & Mary, Sess. 2, c. 2.



I will not do more than sketch the character of the dispute and then leave Bates' case and the case of Shipmoney to give the history of the matter as they do nearly to its end.

Why the King could not live of his own.

The King in the fourteenth century had certain sources of income, feudal dues, crown lands, fees, fines and the like; and the contention of the Parliaments of those days was that the King should 'live of his own.' This meant that the King had an income sufficient for the business of government, and should ask for no more. But it was not really desirable that the King should live of his own. If he had done so he would have been too great for the liberties of the country or too small for its security: he would have been so rich as to make him independent of Parliaments or so poor as to become contemptible among his rivals abroad and his vassals at home. We might never have known parliamentary government, because the King would never have had cause to ask his people for money, or we might never have become a united kingdom, because the monarchy would have collapsed among the rival magnates or have fallen a prey to a foreign invader.

The difficulty never arose, because, in the words of Dr. Stubbs, 'no king of the race of Plantagenet ever attempted to make his expenditure tally with his ordinary income.' It would have been unfortunate either for our liberties, or for our independence and cohesion as a nation, if the kings of that race had been able or had tried to do so.

Modes of taxation.

Direct aids and prises.

Indirect imposition on merchandise.

When the King wanted money in excess of the ordinary revenue he could obtain it either by direct taxation levied on the estimated value of land and chattels, or by indirect taxation in the form of impositions upon exports and imports. Of these the first had been kept within the control of the national assembly or of Parliament by various enactments, from Magna Charta onwards, dealing with the different forms—scutages, aids, tasks and prises—which taxation of this kind assumed. It was not so easy to maintain Parliamentary control over impositions on exports and imports. The King claimed a prerogative to regulate trade, to define the privileges of alien merchants,

to make agreements, apart from Parliament, with the merchants as a sub-estate or class.

After a long struggle the Commons in 1340<sup>1</sup> obtained the passing of a statute, not wholly satisfactory in its terms, limiting the King to a fixed charge on wool, and on other things to the ancient customs, unless Parliament granted more. In 1371<sup>2</sup> they carried a statute which closed the controversy as to wool, and from 1373<sup>3</sup> they regularly granted customs on wine and merchandise for a term of years or for the life of the King, under the name of tunnage and poundage.

The claim of the Crown to levy impositions in addition to the customs thus granted was not raised for nearly two hundred years. But in 1557 Mary laid a duty on cloths exported and another on French wines imported. Elizabeth laid a duty on sweet wines, and these continued to be raised throughout her reign. Imposi-  
tions.

#### *Indirect Taxation. The Case of Impositions.*

James determined to derive a substantial revenue from impositions of this nature. He began by the publication of letters patent increasing the duty on tobacco from 2*d.* to 6*s.* 10*d.* a pound, and on currants from 2*s.* 6*d.* to 7*s.* 6*d.* Bates, a Turkey merchant, refused to pay the additional impost, and the Attorney General took proceedings against him in the Court of Exchequer. Bates set up the statute granting 2*s.* 6*d.*, and averred that he had paid all that the law required him to pay. Judgment was given against him mainly on the ground that trade was matter of general policy falling within the discretion of the King. The King's power was said by the Court to be double, ordinary and absolute. The ordinary power seems in the view of the Court to have been concerned with administration of known existing law; the larger and more indefinite power related to the determination of policy, and could not be The case  
of Bates.  
St. Tr.  
371.

<sup>1</sup> 14 Ed. III, st. 2, c. 4.

<sup>2</sup> 45 Ed. III, c. 4.

<sup>3</sup> Stubbs, Const. Hist. ii. 528.

limited by statute or common law. The right to control trade was put on a level with the right to protect merchants from foreign oppression and to declare war if such oppression should continue.

The protest of the Commons.

Hakewill's argument.

No one at the time seems to have regarded the decision as erroneous or corrupt: but it enabled the King to raise the duties upon all kinds of merchandise. Bates' case was decided in 1606; a great increase on duties was made by a book of rates published in 1608, but it was not until 1610 that the Commons took up the matter, and we get the learned argument of Mr. Hakewill in support of a remonstrance against impositions to be presented by the House to the King<sup>1</sup>. The argument falls into three divisions; the first is directed to showing that by the analogies of the Common Law the Crown did not possess the right which it claimed; the second shows that the claim has been resisted whenever made; the third enumerates the statutes which preclude the Crown from levying impositions. In conclusion he deals with the reasons assigned by the Court of Exchequer *seriatim*.

Argument from Common Law.

The argument drawn from the Common Law is twofold. It is laid down as a general proposition that the customs, so far as they are not settled by statute, are a part of the common-law rights of the King, and that these are all either certain in amount or reducible to certainty, whereas the claim now set up is a claim to levy arbitrarily such sums as it may be the pleasure of the King to demand.

Then it was alleged that for every source of royal expense there is a corresponding source of supply: for the administration of justice, the fines and fees of the Courts; for security of trade, the statutory duties; for offensive or defensive war, the obligations of military service. If these did not suffice the King could ask Parliament for more.

Argument from history.

The historical argument which forms the second part of Hakewill's speech is not quite satisfactory. He states that from the Conquest to the reign of Mary not six cases could be found of impositions levied as James proposed to

<sup>1</sup> For Hakewill's argument, see *State Trials*, vol. ii, p. 407.

levy them. He defines impositions of this sort as 'an increase of custom at the King's pleasure, commanded by him to be taken, the passage being free and open to all men,' and he distinguishes such impositions from other modes of raising money from merchants to which kings had resorted from time to time<sup>1</sup>. He is successful in showing that the cases he cites had never passed without remonstrance by the Commons, and that from the death of Edward III to the accession of Mary no such duties had been imposed. His statements as to the impositions levied by Mary and Elizabeth are not perfectly clear, nor does he tell the whole story. It is certain that both these queens imposed duties, that throughout their reigns duties were paid on exported cloth and imported wine, and that no question was raised in Parliament concerning them<sup>2</sup>.

The third chapter of the argument consists in a recital of the statutes which Hakewill held to be conclusive against the claim of the Crown, and here again it is hard to admit that they meet the case. The statutes cited are not later than 14 Edward III, and every one of them is open to the construction that it deals with taxation of a different character, or with specific and not with general imports on merchandise. Hakewill's common law argument rests on analogy not on authority; his argument from statute is inconclusive, and his historical argument breaks down. And yet, though the decision of the judges was difficult to contest, it is impossible not to feel that the right of the matter was with Hakewill.

The whole of the discussion is a good illustration of the

<sup>1</sup> Of these modes of raising money *dispensations* to export goods of which the export was forbidden by Statute were regarded with jealousy by the Commons, and efforts were made to prevent such dispensations by 27 Ed. III, st. 2, c. 7 and 36 Ed. III, c. 11. Of *impositions by Ordinance*, Hakewill gives but one instance, and then the Ordinance was revoked as soon as made. The *forced loans* were lawful if 'bona fide borrowed and truly intended to be repaid.' The *negotiations with the merchant class* were resisted and finally stopped by the Commons; see Rot. Parl. ii. 229, 25 Ed. III. The Commons petition against a grant made by the merchants, on the ground that the people will ultimately pay the sum granted in the increased prices which the merchants will be compelled to charge.

<sup>2</sup> Hallam, History, i. 317.

**Difficul-** form which constitutional difficulties took in the time of  
**ties in the** the Stuarts. Neither precedent nor statute was conclusive;  
**way of the** each disputant thought he had the law on his side, and  
**argument.** each had in fact an arguable case; for statutes and pre-  
 cedents were applied to circumstances which they were  
 never designed to meet. Difficulties had arisen between  
 the Plantagenet kings and the Commons as to the right of  
 the King to tax and levy impositions; these had been met  
 from time to time in different ways. Sometimes the King  
 conceded the point immediately at issue; sometimes a com-  
 promise was effected; sometimes a statute provided for the  
 circumstances of the case. When similar difficulties arose  
 two hundred and fifty years later, both parties appealed to  
 ancient precedents and statutes which were not only difficult  
 of application in themselves, but which had been overgrown  
 by the practice of the Tudor queens. We, who look at the  
 question from further off, can see that the statutes and  
 precedents of the fourteenth century, if they meant any-  
 thing, meant that the King should not raise money without  
 consent of Parliament, that the door had been closed to  
 direct taxation and the imposition of export duties, and  
 that the express Parliamentary grants of tunnage and  
 poundage, for a term of years or for life, showed the  
 intention of the Commons and of the Crown, until Mary's  
 time, to treat import duties as being in no way different  
 from other modes of raising money. The decision in Bates'  
 case violated the spirit of the constitution rather than the  
 letter of the law.

**Imposi-**  
**tions last**  
**till 1640.**

Hakewill's argument led to a remonstrance by the Com-  
 mons, and this to a reduction of impositions for a while,  
 but the Crown continued to use them as a source of revenue.  
 They were not touched by the Petition of Right, which  
 spoke only of 'gift, loan, benevolence, or other suchlike  
 charge,' but they were dealt with by the Long Parliament.

In the Act of 1640, which granted the King tunnage  
 and poundage for that year, punishments were provided  
 for any officer who should levy such customs without  
 Parliamentary grant, and it was further 'declared and  
 enacted that it is and hath been the ancient right of the

subjects of this realm that no subsidy, custom, impost, or other charge whatsoever ought or may be laid or imposed upon any merchandise exported or imported by subjects, denizens, or aliens, without common consent in Parliament <sup>1</sup>.

*Direct Taxation. The Case of Shipmoney.*

The form which this mode of taxation took was a writ under the Great Seal addressed to the Sheriff of each county, demanding for the King's service a ship or ships of a specified tonnage to be sent—fitted, manned, and victualled—to Portsmouth on a certain day <sup>2</sup>. The cost was to be assessed for the county and some of its boroughs by the sheriff; for other boroughs by the mayor or bailiff. Hampden's share of the contribution demanded from the county of Bucks was £1. He refused to pay it, and was summoned to show cause in the Court of Exchequer in Trinity Term of the 13th Charles I <sup>3</sup>.

The counsel for Hampden followed the same line of argument as was adopted in the Parliamentary discussion on the case of Impositions.

The provision made by the law for the defence of the country by sea was the grant to the King of tunnage and poundage, and the service of the Cinque Ports. To this provision the right assumed by the Crown of levying impositions had added considerably. If more was wanted Parliamentary supply was the only legal source.

Precedents were producible on both sides; of cases where the King had raised money or troops on an emergency, and of cases where he had borrowed or begged money for a special purpose, or had deferred the raising of money till a Parliament could meet. Statutes were conclusive in this case against the claim of the Crown, from Magna Charta to the Petition of Right. In fact it was unnecessary to go beyond the Petition of Right passed nine years before,

<sup>1</sup> 16 Car. I, c. 8, s. 1.

<sup>2</sup> The first writ of Shipmoney (1634) was addressed to maritime towns, the second (1635) and the third (1636) were sent to the whole kingdom.

<sup>3</sup> 3 State Trials, 825.

wherein, reciting Magna Charta and the Statute de Tallagio non Concedendo, it was prayed by the Houses and granted by the King that 'no man hereafter be compelled to make or yield any gift, loan, benevolence, tax or such like charge, without common consent by Act of Parliament'.<sup>1</sup>

Admission of executive power of the Crown.

St. John, one of Hampden's counsel, made in his argument some bold admissions: he declined to draw any distinction between inland and maritime counties in respect of their liability for coast defence. He further admitted that the King was entrusted with the defence of the country, and was judge of the best means for securing that defence. He concedes to the Crown 'that as the care and provision of the law of England extends in the first place to foreign defence; and secondly, lays the burden upon all; and for aught I have to say against it, it maketh the quantity of each man's estate the rule whereby this burden is to be equally proportioned upon each person; so likewise hath it, in the third place, made his Majesty sole judge of dangers from foreigners and when and how the same are to be prevented; and to come nearer, hath given him power by writ under the Great Seal of England, to command the inhabitants of each county to provide shipping for the defence of the kingdom, and may by law compel the doing thereof.'

Its limitation by Parliament.

This was to admit a great deal. But St. John goes on to show that while the King was judge of the policy to be pursued in meeting dangers, Parliament was the proper instrument by which supplies were to be obtained. The only ground for dispensing with a Parliamentary grant and resorting to arbitrary taxation would be the imminence of danger, and Hampden's counsel had no difficulty in showing not only that no danger was imminent, but that no such imminent danger was alleged in the writ.

Decision that Rex is Lex.

The judges, by a majority of seven to five, decided in favour of the Crown, some, as Finch and Weston, on the ground that the King was constrained or might be constrained by the necessities of the defence of the kingdom to raise money without waiting for a Parliament; others,

<sup>1</sup> 3 Car. I, c. 1, s. 10.

alleging the superiority of the King to the law. The opinion of these last may be taken in the words of Berkeley, 'the law is of itself an old and trusty servant of the King's: it is his instrument or means which he useth to govern his people by. I never read nor heard that *Lex* was *Rex*, but it is common and most true that *Rex* is *Lex*, for he is *Lex loquens*, a living, a speaking, an acting law <sup>1</sup>.'

In this matter of taxation, as fifty years afterwards in the case of the dispensing power, judges were found to maintain that for taking the subject's money Acts of Parliament were unnecessary, as later that for imposing general rules of conduct, Acts of Parliament were precarious; for the King, the source of all law, might if he chose do without them or set them aside.

The Long Parliament, by Statute 16 Car. I, c. 14, declared the judgment in the case of shipmoney to be contrary to law, and enacted the observance of the provisions of the Petition of Right, and the Bill of Rights enacts—

'That the levying money for or to the use of the Crown by pretence of prerogative, without grant of Parliament, for longer time or in other manner than the same is or shall be granted, is illegal <sup>2</sup>.'

It is noticeable that throughout the controversies between Crown and Parliament in the seventeenth century the same difficulty recurs and presents itself under different aspects, to such of the parties as were not wholly engrossed in the technicalities of the discussion.

Practical difficulties of the question.

There must be some person or body in the State capable of acting promptly in cases of emergency. A Parliament if not sitting has to be called, and is at best an unwieldy body for the purpose of dealing with present and pressing difficulties.

In the seventeenth century the choice lay between the submission of such difficulties, as they arose, to Parliament, and the assignment of great and dangerous power to the Crown. And apart from the danger to liberty of entrust-

<sup>1</sup> State Trials, iii. 1098.

<sup>2</sup> 1 Will. & Mary, st. 2, c. 2.



ing the Crown with the powers claimed for it by its advocates there was a practical inconvenience. If a king, animated with the best intentions, persistently blundered in the exercise of his discretion, there was no remedy short of a revolution.

Our cabinet system is the solution of the puzzle of the seventeenth century: we fix responsibility upon a group of ministers who can be removed if they fail; we do not fear lest they should threaten our liberties, and at the same time we expect that the servants of the Crown and the nation will not shrink from responsibility if occasion should arise when action must be taken without waiting to secure the acquiescence of Parliament.

#### § 4. *Influence of the Executive on the Legislature.*

Influence  
of execu-  
tive on  
legisla-  
ture.

In the previous sections of this chapter I have described attempts made by the Crown to resume those functions in the State which had once belonged to the Crown in Council before Parliament grew up alongside the older institution, before the executive and legislature had become distinct bodies with appropriate duties. But I must not leave this part of my subject without noting other modes by which the executive has endeavoured to control the legislature, not by interfering with its duties but by influencing its action.

#### *Influence of the Crown upon the Commons.*

So soon as the rights of Parliament in respect of taxation and legislation became clear and definite the King and his ministers began to consider how far their wishes could be effected by the instrumentality of Parliament, and in particular of the Commons.

Dealings  
with the  
constitu-  
tion of the  
House;

The modes adopted in view of this end may be said to have passed through three stages. The Tudors attempted to obtain a subservient House of Commons by the creation of constituencies and the management of elections. The

first Stuarts, with the exception of the attempt of James to form a Court party in Parliament, tried methods more in accord with their high notions of prerogative and their contempt for constitutional forms. They influenced debate, so far as they tried to influence it, by interference with freedom of speech; but they preferred to dispense with Parliamentary forms and to fall back on the independent action of the Crown described in the earlier sections of this chapter. The third stage commences with the Restoration: the King could no longer venture to create new constituencies nor to interfere directly with freedom of speech in Parliament; he addressed himself to the corruption of individual members, by places, by pensions, and by bribery. After the Revolution this method became more frequent and systematic as the House of Commons increased in power with no corresponding increase in responsibility. The art of Parliamentary management, as we shall have to note shortly, attained its perfection in the fifty years preceding the concession of independence to the American Colonies.

The influence exercised by the Tudor sovereigns upon the House of Commons was of two kinds, the creation or restoration of constituencies designed to be under the influence of the Crown, and instructions general or special addressed to the sheriffs or to electors conveying recommendations or commands about the elections.

The additions made by Henry VIII to the representation of the country are free from the suspicion of any sinister motive. One cannot say the same of the twenty-two new members added in the reign of Edward VI. Fourteen of these were returned by seven Cornish boroughs, and from the number of persons represented and the qualifications of the electors in the year 1816 it may be concluded that with all due allowance for changes in the fortunes of these boroughs they never were expected to be free from external influences. The constituencies were as follows:—

Bossiney, mayor and freemen chosen by the mayor . . .	9
Newport, burgage tenants paying scot and lot . . .	62

Westlooe, corporation, consisting of twelve persons who need not reside . . . . .	12
Grampound, mayor, recorder, aldermen and freemen .	42
Saltash, mayor and free burgesses . . . . .	38
St. Michael's, portreeve, lord of the manor and in- habitants paying scot and lot . . . . .	18
Camelford, corporation being inhabitant householders paying scot and lot . . . . .	9

Mary added or revived fourteen boroughs, Elizabeth, thirty-one<sup>1</sup>. The clear intention of these additions was to form a court party in the House of Commons, and to obtain seats for men who held places or expected favours of the Crown and who would vote as they were told if constituencies were made or found for them.

Interference with elections.

The creation of new boroughs, or the revival of old ones, would not, however, have been of much use if the Court had not taken active steps to fill them with suitable representatives. This was done either by general directions to the returning officers for the election of members of a certain character, or by express recommendations of individuals.

Instructions to sheriffs.

A circular addressed to the sheriffs in 1553 is an illustration of both forms of interference. It bids the sheriffs give notice to the electors that they should, in the first instance, choose residents of knowledge and experience, but that, if the Privy Council should make special recommendation of men of learning and wisdom, such direction should be regarded.

Nominations.

This interference with elections by the Privy Council or by ministers of the Crown or noblemen did not pass unnoticed by the Commons. The nomination of courtiers or placemen was almost certain to prove inconsistent with the statute of Henry V, which made residence a qualification for election. Accordingly in 1571 a bill was brought

<sup>1</sup> Of the boroughs added by Mary ten were newly enfranchised, of those added by Elizabeth twenty-five. About this time members habitually ceased to press for their wages, and this among other reasons inclined boroughs which had ceased to return members to ask for a revival of their privileges.

in to make valid the election of non-residents. The supporters of the bill argued that it would give to every constituency the choice of the best available candidates, and thus was raised the question whether a member represented the general interests of the whole kingdom or the local interests of those who returned him. The opponents of the bill did not rest their opposition on the fear that local interests might suffer; they urged the risk of such interference with the representation as we have been discussing, the probability that candidates would be nominated by noblemen and courtiers and that 'lords' letters would bear sway<sup>1</sup>. The bill was read a second time and committed, but was then dropped.

The wholesale creation of constituencies ceased with the accession of James I. The additions made in his reign to the representation were mostly by way of revival of constituencies which had ceased to return members, and were the result of the action of the House of Commons ordering a warrant for the issue of a writ. An illustration is afforded by the cases of Pontefract and Ilchester in the year 1620, as to which the following entry appears in the Commons' Journals of the report of the Committee of Privileges<sup>2</sup>:—

Additions  
of James I  
to consti-  
tuencies:

revivals of  
electoral  
rights.

'For Pomfrett that 26 Ed. I it sent burgesses; which continued a good while after. That by reason of the barons war it grew poor. That 10 & 11 Hen. VI, a return made, they could not send burgesses by reason of poverty.

That 4th Jac. the king granted them all their former liberties and customs.

That the Committee thinketh it to stand both with law and justice that a writ should go for choice of burgesses.

For Ilchester:—till Hen. V time sent burgesses. Upon question, Pomfrett to send burgesses. Upon like question, Ilchester to send burgesses, and writs for both.'

This shows that the right of sending members to Parliament began to be prized as the Commons grew more independent and the general interest in politics more keen,

<sup>1</sup> D'Ewes, Journal, 168.

<sup>2</sup> Com. Jour. i. 576.

The Undertakers.

and serves to explain how it was that the Stuart kings first had recourse to other measures for influencing Parliament. By the advice of Bacon, James I endeavoured to form a Court party in the House, not merely of placemen or nominated members, but of aspirants for Court favour, who might influence the temper of the Commons in the King's interests. These persons were called 'Undertakers.' Such a group of members, professing to form a channel of communication between Crown and Commons, came into existence again in the time of Charles II, and reappears under somewhat different conditions in the 'King's friends' of George III.

But attempts to influence the House of Commons were not very congenial to kings who maintained, as James maintained, that the privileges of the House were 'derived from the grace and permission of his ancestors and himself' and might be 'retrenched' at his pleasure: or who, like Charles I, could, through the mouth of his ministers, threaten the House that if they trenched on his prerogatives they might 'bring him out of love with Parliaments'.

Parliamentary management after Restoration.

Interference with freedom of debate, such as has been spoken of under the head of Parliamentary privilege, and invasion of the province of Parliament by independent legislation and taxation, were the rough methods employed by Charles, and it is not until after the Restoration that we find a revival of attempts to influence members.

Charles II ventured only upon one addition to the constituencies, that of Newark, by royal charter, an exercise of the prerogative which did not pass unquestioned by the Commons<sup>2</sup>, during his reign. The forfeiture and re-modelling of the borough charters at the end of the reign of Charles II and at the commencement of the reign of James II is the last form of violent external measures used by the King to affect the representation. The ill success of the attempts of James II to dispense with the forms of the constitution made it clear that, if the House of Commons

<sup>1</sup> Gardiner, *Hist. of England*, vi. 110.

<sup>2</sup> *Com. Journals*, ix. 403. The city and county of Durham were enfranchised by 25 Car. II, c. 9.

was to be managed in the interest of the Crown and of the ministers of the Crown, this must be done otherwise than by tampering with the representation of the country in Parliament, or by interference with freedom of debate.

After the Revolution the House of Commons, from causes we have noted, had become the chief power in the State. In order to carry on the business of government it was necessary that the ministers of the Crown should have the continuous support of a majority of that House. But such continuous support was not easy to secure. Throughout the reigns of William and of Anne party spirit was, on the whole, sufficiently vehement to supply to some extent the want of party discipline. Yet the corruption of members by places and bribes was common, and the management of elections through the returning officers was an important object of ministerial care <sup>1</sup>.

Increased difficulties of executive.

But it was not till after the accession of the Hanoverian kings that Parliamentary management became a system under the hands of Walpole. He realized to the full the importance of a working majority in the Commons, and the difficulty of keeping it together.

Systematic corruption of Parliament in 18th century.

The difficulty was serious. The engrossing political issues of the seventeenth century were in a great measure laid to rest, and there was not excitement enough in politics to create genuine party divisions. The House debated with closed doors, and its members were free from external criticism. The constituencies often were so small, so inert, or so corrupt as to care little what their members said or did. In the absence of any external control over the conduct of members, and of any real political interests or issues to keep parties together, in the demoralization of politics, which was partly due to the moral collapse of the Restoration, partly to the risks and uncertainties of

How it was possible.

<sup>1</sup> In the Wentworth Correspondence, p. 135, the defeat of the Whigs in 1710 is attributed to an electioneering blunder. They had thought there would be no election till the next year, 'so had directed her Majesty's choice of sheriffs, almost throughout England, of Tories; their friends they kept off till next year, when they thought they should have use of them in the elections of Parliament men.'

political life during the past forty years, it was not easy for Walpole to get a majority to support his ministry out of mere public spirit. Nor did he try to do so. He accepted the condition of public morality. He kept his majority together by the simple process of bargain and sale. But that which had been done intermittently during previous reigns, he did in a businesslike and systematic way. Bribery is not easily proved where it is to the interest of all parties concerned to keep the secret; but Walpole's hints to his successor, Henry Pelham, as to the best mode of keeping together the rank and file of the party, are quite sufficient to indicate the mode in which the House of Commons was 'managed' between the years 1721 and 1742.<sup>1</sup> The process of management continued under Henry Pelham and his brother, the Duke of Newcastle, until George III took into his own hands the business of corruption. To trace the gradual emancipation of the House of Commons from such influences would be to write the political history of England from the death of Henry Pelham to the Reform Bill of 1832.

How it  
came to  
cease.

The elder William Pitt was the first to prove to the political managers of the eighteenth century that there was a public outside the constituencies capable of taking a generous interest in political matters. The members of the Whig party who grouped themselves under the leadership of Lord Rockingham did something to show that common opinions on the conduct of affairs of state may bind a party together as well as ties of relationship or the prospect of mutual gain. One antidote for the political corruption of the eighteenth century was to be found in the growth of genuine political interests throughout the country. Such interests would diminish the necessity for giving bribes and the inclination to receive them: but publicity of debate and reform of the representative system could alone furnish a real security that members of the House of Commons would attend to the interests of their country rather than to their own. When members become

<sup>1</sup> Coxe's Pelham, i. 93.

responsible to popular constituencies, and when the constituencies have the means of knowing what their members say, and how they vote, a minister can only hope to obtain precarious and occasional support by offering personal advantages to individuals. But I need not carry this matter further. Nevertheless it is necessary to speak shortly of the various inducements offered to members, and the process by which Parliamentary management was effected.

*Modes of influencing members.*

With official disqualifications I have already dealt in Offices and pensions. describing the persons who may be elected to serve in the House of Commons; but historically such disqualifications fall into two groups. Those created during the greater part of the eighteenth century were designed to secure the independence of Parliament: the more modern disqualifications are for the most part imposed to secure the undivided attention of officials to the business of their departments, and the advantage of a permanent civil service unaffected by changes of ministry or by considerations of party politics.

The legislation which had specially in view the elimination from the House of Commons of persons whose votes would be at the disposal of the King and his ministers extends from the close of the seventeenth century to the reforms initiated by Burke in 1782.

The amount of influence accruing to the Crown from the places which were thus abolished, or made to disqualify, may be collected from Burke's speech on Economical Reform, made in support of the Civil List Act of 1782. It is not difficult to see the use to which such places were put when the reform of the king's household was thwarted because 'the turnspit in the king's kitchen was a member of Parliament'; when the Board of Trade could be described as 'a sort of temperate bed of influence: a sort of gently ripening hot-house where eight members of Parliament receive salaries of a thousand a year, for a certain given time, in order to mature, at a proper season, a claim to two



thousand granted for doing less, and on the credit of having toiled so long in that inferior laborious department.'

Government contracts.

Another form of corruption, applied chiefly to commercial members, was the grant of a government contract, such as to supply the navy with beef or the army with cloth.

Such a contract was given, not for the advantage of the branch of the service to be supplied, but with a view to the parliamentary support of the contractor. The service was ill supplied. The constituents did not obtain the unbiassed attention of their member to local or national interests, and everybody was injured by the transaction, except the member who made money out of the contract, and the minister who secured the member's vote<sup>1</sup>.

This practice was brought to an end by the disqualification of holders of government contracts by 22 Geo. III, c. 45.

Shares in loans.

A more expensive form of corruption was practised in the latter part of the eighteenth century, during the ministries of Bute, Grafton and North. It consisted in assigning to friends and supporters of the minister shares in government loans and lotteries. By this means the country was made to borrow money on terms considerably above the market price, and, in the case of a loan brought out by Lord North, sustained a loss of nearly a million upon the transaction. The practice was abandoned by Pitt, who, from the time that he became minister in 1784, when he wanted to raise money by loan, invited offers which were sent to him sealed by the persons who desired to take up the loan. These tenders were opened in the presence of those who had made them, and the best offer was taken<sup>2</sup>.

Payment for votes.

But these modes of influence were occasional and unsystematic as compared with the direct method of bribery which prevailed from the reign of Charles II to the end of the ministry of Lord North in 1782.

Much has been said and many authorities cited as to the

<sup>1</sup> Parl. Hist. xx. 123-129, and xxi. 1333 and 1365.

<sup>2</sup> See May, Constitutional History, vol. i. 325, and the authorities there cited.

corruption of Parliaments between these periods. Its prevalence during the reigns of Charles II and William III is attested by Burnet<sup>1</sup> and affirmed by Macaulay<sup>2</sup>. Individual cases of the receipt of money by members of either House in consideration of support given to ministers are instanced by Sir E. May<sup>3</sup>. But the systematic maintenance of a ministerial majority by the regular payment of bribes seems to have been the invention of Walpole. The evidence is scanty, but there is significance in Walpole's advice to Henry Pelham, advice given by a man who had retired from office to the man whom he desired to succeed him in power. 'I think it needless to suggest to you the necessity of forming within yourselves your own scheme. *You must be understood by those you are to depend upon, and if it is possible they must be induced to keep their own secret* <sup>The system of Walpole;</sup> <sup>4</sup>.' Such advice explains the requirement of leaders of the House of Commons, when the Prime Minister was a member of the House of Lords, that they should be 'authorized to talk to members of the House of Commons on their several claims and pretensions.' It explains also the fluctuations in the expenditure of the secret service money in correspondence with the Parliamentary needs of government.

George III, who liked to be his own minister, paid great attention to this department of ministerial duty. His correspondence with Lord North, particularly at the time when that minister was about to retire, affords abundant illustration of the use made of the secret service money and of the King's savings out of the civil list, to corrupt members and constituencies.

Thus in 1782 the King writes<sup>5</sup>: 'I must express my astonishment at the quarterly accounts of the secret service being only made up to the 5th of April, 1780. No business ought ever to be the excuse for not doing that.'

<sup>1</sup> Hist. of his Own Time, ii. 144.

<sup>2</sup> Hist. of England, iii. 541.

<sup>3</sup> Constitutional Hist. of England, i. 312.

<sup>4</sup> Cox's Pelham, 193.

<sup>5</sup> Correspondence of George III with Lord North, vol. ii. 421-5.

**Payments to members of Lords and Commons.** 'I shall make out the list paid by Mr. Robinson to Peers, and shall give it to the First Lord of the Treasury: but I cannot answer whether under the idea of influence there will not be a refusal to continue them. Those to members of the House of Commons cannot be given; they may apply if they please to Lord Rockingham, but by what he has said I have not the smallest doubt he will refuse to bring their applications as well as those of any new solicitors in that House.'

Lord North apologizes for the delay 'with a heart full of the deepest affliction.'

'The secret service list was always ready after every quarter, so that no delay is imputable to him. Mr. Robinson, *whose list is of a nicer nature*, never omitted entering every sum he paid the moment he paid it, so that every article of his account is kept in perfect order.'

It would seem from this that such members of either House as desired to be retained in the service of the ministry made application to the minister, that he communicated their wishes to the King, received authority to expend the necessary sums of money, made the payments, and accounted for them in a book which should have been sent quarterly to the King.

The allusion to Mr. Robinson's list as being 'of a nicer nature,' suggests that the purchase of a Peer's vote and influence involved more delicacy and secrecy than was needed in dealing with a Commoner.

Other forms of corruption are disclosed in this winding up of business between the King and North. No other minister was so completely in accord with George III as to the methods of politics, and to this we probably owe the frank disclosures in their correspondence.

**Pensions.** Secret pensions were paid to members in breach of the law; and in prospect of the advent to office of a minister who would not connive at such proceedings, these pensions were set down in the names of the wives of such as were married. Poor George Selwyn, who was a bachelor, had to forgo his pension altogether. 'He must look to better days,' said the King.

But the most serious item of expenditure revealed in this part of the correspondence was the outlay in bribery at elections. 'If Lord North remembers correctly, the last general election cost near £50,000 to the Crown, beyond which expense there was a pension of £1000 a year to Lord Montacute and £500 a year to Mr. Selwyn for their interest at Midhurst and Ludgershall.' On bye-elections alone the King had spent £13,000 in three years. But Lord North says of the members who were assisted to come into Parliament that 'they all behaved with very steady attachment to the end.'

A cheaper mode of securing the support of members who held commissions in the army and navy was to deprive them of their commissions if they voted against the government. I have already alluded to this infringement of the privilege of freedom of debate, which was, as Burke says, discountenanced and altogether abolished in Lord Rockingham's short administration in 1765.

Besides these grosser forms of corruption, and in substitution for them as direct bribery and intimidation of members ceased, honours and dignities were held out as inducements to rich men or large landowners to support the government. At a time when many boroughs were, so far as representation went, articles of property, the votes which an owner of boroughs could command might be placed at the disposal of a minister in consideration of a peerage, or an advancement of rank in the peerage. By this means Pitt, between the years 1784 and 1801, was able not merely to strengthen his position in the House of Commons, but to change in great measure the political colour of the House of Lords, by the creation or promotion of 140 peers.

#### *Purchase or corruption of constituencies.*

All these modes of influencing members of the House of Commons were rendered possible only by the condition of the representation. The counties were independent, but

Purchase  
of  
boroughs.

Bribery  
of con-  
stituents.

were not likely to look beyond the county families, and the cost of a contest was enormous. In many boroughs there were no electors capable of expressing an opinion; where there was such an electorate its opinion was often determinable at a known price. Thus a seat in Parliament for a borough was in most cases a matter of bargain and sale; only in some cases the seat was purchaseable without any reference to electors, in other cases the electors made their own terms. The two parties in the state competed with one another for the possession of such seats as were to be bought out and out, and a man who wished to get into the House of Commons, and who had no such local interest as would procure his election for a county, could not easily obtain a seat except as nominee of the government or of the opposition, or by the favour of an owner of boroughs, or by purchasing a seat for himself.

The ministers had resources which enabled them to compete successfully with other purchasers of seats, and the domestic economy of George III was, as appears above, not without reference to electioneering interests. But we are not here concerned with the defects of the representative system before 1832<sup>1</sup>, except in so far as they rendered the House of Commons susceptible to the influence of the Crown and its ministers.

The great change in this respect dates from the Reform Bill of 1832. The modern constituency exercises a far more potent control over the actions of its member than royal or ministerial influence. The independence of members, in so far as it is restricted at the present time, is restricted by the party organization which dominates the constituencies: and the party whip who constrains the member to vote as the party organization has determined.

### *Influence of the Crown upon the Lords.*

So far we have spoken chiefly of the influence of the Crown on the House of Commons. Its influence on the

<sup>1</sup> Curwen's Act, 49 Geo. III, c. 118, forbade the public sale of seats, but the law was evaded. May, Const. Hist. i. 293.

House of Lords has been of two kinds. Firstly, the Lords are from their position and mode of life more easily affected by any expression of the personal wishes of the Crown. On two notable occasions such an expression of the royal wishes has determined the action of the House of Lords on an important question.

When, in December 1783, Fox's India Bill had passed the Commons, and was under discussion in the House of Lords, George III had an interview with Lord Temple, afterwards Marquis of Buckingham, and empowered Temple to say that, 'whoever voted for the India Bill was not only not his friend, but would be considered by him as his enemy; and if these words were not strong enough, Earl Temple might use whatever words he might deem stronger and more to the purpose.'

This statement was written out in the King's own hand. It was shown by Temple to peers who were wavering in their opinion of the merits of the bill, and to peers who were apt to be guided in their political conduct by an intimation of the King's wishes. The result was that the bill was thrown out on a motion that it should be committed.

A like influence was brought to bear upon the House of Lords in order to bring about the passing of the Reform Bill of 1832. The first Reform Bill had failed on an adverse resolution, carried as a preliminary to its being committed, in the House of Commons. The second Reform Bill had been thrown out on the second reading in the House of Lords. The third Reform Bill, after passing the House of Commons and the second reading in the House of Lords, was in course of being so handled in committee as to defeat the objects of the ministry who had introduced it. Lord Grey and his colleagues resigned. A Tory ministry which Lord Lyndhurst and the Duke of Wellington endeavoured to form was made impossible by the refusal of Peel to be a party to any measure of Reform however moderate. Lord Grey was recalled, but the attitude of the Peers remained hostile. It seemed that the course which Harley and Bolingbroke had adopted would have to be followed

and that a creation of peers, on a greater scale than was required in 1712, would become necessary. The King reluctantly assented to such a creation, but, at the same time, he had recourse to the policy of George III. His secretary was instructed to inform the Duke of Wellington that the matter might be settled by 'a declaration in the House of Lords, from a sufficient number of peers, that they have come to the resolution of dropping their further opposition to the Reform Bill.' This communication caused Wellington, and with him the leaders of the Tory opposition in the House of Lords, to abstain from any further attack upon the bill, and it speedily became law.

(2) Power  
of creat-  
ing peers.

The creation of peers by the Crown in order to bring about the passing of a measure is a power which has only once been exercised.

In 1712 it was necessary, in order to secure approval of the Peace of Utrecht, that the Whigs should be placed in a minority in the House of Lords. The matter was promptly dealt with by the Queen and her advisers; twelve new peers were created, and a Tory majority secured. This exercise of the prerogative seems to have created no public excitement, nor to have met with much severer comment than the jest of Wharton, who asked the twelve new peers, as they were about to take part in a division immediately after taking their seats, 'whether they intended to vote singly or by their foreman.' Subsequently the advice given by Harley to the Queen was made one of the numerous articles of his impeachment; but the point was not pressed.

Possible  
effects of  
the use  
of this  
power.

[Yet here is a dormant power existing in our constitution, which, if exercised, might produce strange results. The King might, without exceeding his legal rights, double or treble the number of the House of Lords. He might do this, and might do so by the introduction of persons whom he selected for no other reason than personal liking or caprice. We are told that this prerogative may be regarded as a constitutional safeguard, a means of bringing the legislative action of the House of Lords into correspondence with the wishes of the people as represented in the

House of Commons. In an earlier chapter I have discussed Page 233. the merits of this mode of producing harmony between these two branches of the legislature. No doubt the knowledge that a large creation of peers was seriously contemplated by William IV and his ministers contributed to secure the passing of the Reform Act in 1832. But in fact the use of this prerogative ranks, with impeachment and the royal veto, among things which might happen, but almost certainly will not happen<sup>1</sup>.

It must be admitted that the prerogative of increasing the peerage is more formidable than the veto upon legislation. The will of an individual cannot long hold out against the expressed intentions of a nation, but the course of legislation and policy might insensibly be altered in many ways by the alteration in political character of one of the two legislative chambers.]

I leave the passages in brackets as they stood when the last edition of this book appeared. I believe that they represent the ideas then prevailing, on this subject, among students of the constitution.

In preceding pages I have described the circumstances under which this prerogative has been recently called into play. It is enough to say that the revival of a prerogative not unreasonably supposed to be obsolete, and, still more, the conditions under which ministers were empowered to threaten its exercise, indicate a shifting of the balance of political forces the outcome of which must remain a matter of curious, if not of anxious, speculation.

<sup>1</sup> It may and does happen in self-governing colonies which possess a second chamber nominated by the Governor on the advice of his responsible ministers. See *The Crown*, vol. ii, part ii, p. 79.



## CHAPTER IX

### THE HIGH COURT OF PARLIAMENT

Functions  
of Parlia-  
ment not  
only legis-  
lative,

THE legislative omnipotence of Parliament is perhaps the most conspicuous feature of our constitution to any one who seeks to compare the disposition of forces in different political societies. What is usually understood, elsewhere than in England, by a constitutional government, is a government the ordinary working of which is regulated by a written constitution, a constitution which cannot be altered by ordinary legislative procedure, which needs for its alteration some abnormal process for obtaining the expression of national consent.

But our Parliament can make laws protecting wild birds or shell-fish, and with the same procedure could break the connection of Church and State or give political power to two millions of citizens, and redistribute it among new constituencies. It is little wonder then that with this constant process and possibility of change before our eyes, we lose sight of the other functions of Parliament in the contemplation of its legislative power.

but ju-  
dicial.

As I had occasion to note in speaking of the Royal Proclamation for the summons of Parliament, the King calls a Parliament with no ostensible purpose of legislation, but that he may 'have the advice of his people.' And Parliament discharges various and important functions answering to the work of the ancient Council of the Crown. In dealing with the duties which the Houses discharge as constituting the High Court of Parliament, we must be careful to distinguish the direct from the indirect, those which are based on rules of law, and those which rest on use or convention.

§ 1. *The direct and indirect judicial power of the Houses.*

Lord Coke says boldly that, 'the Lords in their House have power of judicature, and the Commons in their House have power of judicature, and both Houses together have power of judicature<sup>1</sup>.' But we must strictly limit the sense in which judicial attributes are thus assigned to the two Houses severally and jointly.

Each has, as we have seen, a jurisdiction over its own members and over the general public in respect of contempt against itself. Each has certain powers of a judicial character in dealing with the constitution of its own body and the right of persons who claim to be members of that body. The Lords can try their own members if charged with treason or felony. They also constitute a final court of appeal for the United Kingdom. Acting jointly, the Lords can try and sentence a criminal impeached by the Commons, or a Bill of Attainder can be passed by both Houses and presented to the Crown.

Beyond this neither House has an original jurisdiction as a Court of first instance, but in times past each House has claimed such a jurisdiction.

The House of Lords at one time asserted a right to jurisdiction in matters of importance where the remedy given by the ordinary Courts might be inadequate or difficult of attainment—such a jurisdiction, in fact, as was exercised with salutary effect by the King's Council in the Star Chamber in the early part of the sixteenth century. It was in virtue of this claim that upon reference from the Crown they undertook to try the dispute between Skinner and the East India Company in the year 1667. Skinner complained that the company had seized his ship and goods, and had dispossessed him of a house and small island near Sumatra. The judges advised the Lords that Skinner had a remedy in the Courts at Westminster for the seizure of his ship and goods, but not for the loss of his house and island.

<sup>1</sup> iv. Inst. c. 1. p. 23.

The Lords thereupon heard the case, and in April, 1668, gave judgment against the Company and in favour of Skinner for £5,000: in May, 1669, they sentenced the deputy governor of the Company, Sir Samuel Barnadiston, to pay a fine of £300, and to remain in custody till it was paid, for a breach of privilege in petitioning the Commons against their action in the matter. Meantime the Commons had voted that the action of the Lords was contrary to law, and inasmuch as some members of the East India Company were also members of the House<sup>1</sup>, that their privileges had been infringed. The quarrel between the two Houses was not brought to an end by a prorogation in December, 1669. It showed signs of reviving when the Houses met again in February, 1670. The King thereupon came forward as mediator, and at his request both Houses consented to erase from their journals all records and entries of the matter. The Lords thereby admitted that they had no jurisdiction as a court of first instance, and that to petition the Commons against such an exercise of jurisdiction was a fair exercise of the general right of the subject to petition<sup>2</sup>.

and by the  
Commons.

The House of Commons too has set up a jurisdiction as a court of first instance to try political offences. Numerous cases are to be found in the Journals of the House during the seventeenth century of the exercise of such a supposed jurisdiction, but perhaps the most conspicuous is also happily the last. It occurred in 1721, when the House by resolution committed to Newgate a prisoner named Mist for the publication of a journal which contained expressions of a hope for the restoration of the Stuarts. There was no suggestion of a breach of privilege by Mist, and the House dealt with his conduct as constituting a purely political offence<sup>3</sup>. Although the House never repeated such an assumption of judicial power, yet in the eighteenth century, when privilege was in other respects extended to the detriment of free discussion, both Houses did take upon

<sup>1</sup> Hatsell, vol. iii, p. 189.

<sup>2</sup> For a detailed account of this great controversy, see Hargrave's Preface to Hale, Jurisdiction of the House of Lords, pp. ciii-cxxiv.

<sup>3</sup> Hallam, Const. Hist. iii. 276.

themselves to determine questions of private right arising between their members' servants and the outside public<sup>1</sup>.

The attempted assumption by the Lords of a jurisdiction in cases such as that of *Skinner* was probably a result of the disappearance of the jurisdiction, which, in the court of Star Chamber, had from time to time been exercised in a salutary manner for the bringing to justice of great offenders. The extensions of privilege to matters outside its proper limits were the acts of two irresponsible and not very public-spirited bodies at a time in our history when the privileges and emoluments of power were more regarded than its duties. I do not propose to deal with these disputed or excessive exercises of jurisdiction, nor is it necessary to touch again upon the undoubted rights of the Houses to maintain their dignity by committal for contempt, and to provide that unqualified persons do not take part in their business or deliberations. Nor again will I here repeat what I have said in an earlier chapter concerning the right of a peer to be tried by his peers<sup>2</sup>.

But the criminal jurisdiction exercised by Parliament through the process of impeachment is a distinct feature of its attributes as a court. The appellate jurisdiction of the House of Lords is doubtless a survival of a portion of the jurisdiction of the Curia Regis, and of the time when a session of Parliament was not easily distinguished from a session of the Magnum Concilium.

The practice of petitioning Parliament dates from a time when Parliament might be expected to attend to individual cases of hardship and provide a remedy.

And another judicial duty is thrown upon Parliament by the removability of certain officers of the executive upon address from both Houses to the Crown. These are the legal duties of Parliament as a high court.

Then we come to those which rest on use and convention, the practice of inquiring into the conduct of individuals or of departments by committee of either House; of determining, by votes of censure or adverse decisions, on important

<sup>1</sup> See instances cited in Pamberton on Privilege, p. 87.

<sup>2</sup> *Supra*, p. 233.

subjects, that the executive has no longer the confidence of the country. The criticism and censure of the executive is not a judicial act, nor except in a figurative sense can it be regarded as a function of the High Court of Parliament. And yet it is impossible not to recognize the fact that members are returned to the House of Commons to give a qualified or unqualified support to a minister or a policy, and that though indirect in its operation the control exercised by Parliament on the choice and action of the ministers of the Crown is a part of its functions as the Grand Inquest of the nation.

### § 2. *Impeachment.*

Origin  
of the  
practice.

The practice of impeachment by the Commons at the bar of the Lords dates from the reign of Edward III. It should be distinguished from the system of Appeals in Parliament by which private accusers endeavoured to get a trial before Parliament of the person whom they charged with an offence<sup>1</sup>. The Lords had declared in 1387 that the case of any high crime touching the King's person and the state of his realm, committed by Peers of the realm, with others, should be dealt with in Parliament, and according to the law and course of Parliament<sup>2</sup>. Such a court bound by no settled rules, and disregarding the advice of the judges, might create the offence and the penalty in the course of its judicial proceeding; such appeals were forbidden by 1 Hen. IV, c. 14. They revive in an altered form in the Acts of Attainder, by which in the latter part of the fifteenth and throughout the sixteenth century persons who had played for a high stake in politics and lost it, or who, by no fault of their own, chanced to be on the unpopular side, were hurried to death with no form of trial.

<sup>1</sup> Sir FitzJames Stephen, *Hist. of Criminal Law*, vol. i, p. 154, appears to hold that Impeachment originated in these Appeals; but the two modes of procedure are in fact distinct.

<sup>2</sup> Rot. Parl. iii. 236.

Impeachment, on the other hand, was one of the various forms in which the Commons tried to obtain control over the conduct of the ministers of the Crown. The control was of value when King and ministers were prepared to disregard the law, and when Parliament could not bring constant, regular pressure to bear upon them. Thus out of fifty-four impeachments which have taken place since the year 1621, nineteen took place in the first three years of the Long Parliament. As soon as the House of Commons became able so to control and review the conduct of ministers as to make it impossible for them to conduct business without a Parliamentary majority, impeachment lost its value and fell into disuse.

As only two cases, those of Warren Hastings<sup>1</sup> and Lord Melville, have occurred in the last hundred and fifty years, and none since 1805, the subject is hardly one of practical interest. It may be well, however, to summarize the procedure of an impeachment, and to note the constitutional questions that have from time to time arisen in respect of it.

The first stage in the proceedings is to induce the House of Commons to take action, and this is done by a member charging the accused person with high crimes and misdemeanours and moving that he be impeached.

Motion for  
impeach-  
ment.

If this motion is carried, the member at whose instance it was carried goes to the bar of the House of Lords and impeaches the accused 'in the name of the Commons of the United Kingdom.' A Committee of the House of Commons is then appointed to draw up articles of impeachment, and these, when drawn, are delivered to the House of Lords. They are also delivered to the person accused, who may, if he pleases, answer them.

Articles of  
impeach-  
ment :

If the accused is a peer he is taken into custody, for the trial : purposes of the trial, by order of the House of Lords; if a commoner, by the serjeant-at-arms, who delivers him into the charge of the usher of the Black Rod. The

<sup>1</sup> Warren Hastings in India, like a minister in the seventeenth century, was in a position to do many questionable things before he could be called to account, but the proceedings in his case from their length and futility served to show that impeachment was out of date.

Commons appoint managers to conduct their case, and the trial proceeds in Westminster Hall. The forms of a criminal trial are followed, the Lords sitting as judges, the Lord High Steward presiding if a peer is on his trial, the Lord Chancellor or Speaker of the House of Lords in the case of a commoner.

**verdict :** At the conclusion of the case the question of 'guilty' or 'not guilty' is put to each peer, beginning with the junior baron, on each of the articles of impeachment. Each answers in turn, standing uncovered, with his right hand on his breast, 'guilty,' or 'not guilty,' 'upon my honour.' The numbers are ascertained, and the decision of the House announced by the presiding officer to the House and to the accused.

If a verdict of guilty is found by a majority of the Lords, it still rests with the Commons to determine whether this verdict shall be proceeded upon. The Lords are not entitled to pronounce sentence until the Commons demand it.

**sentence.** When the Lords have determined upon the sentence to be given, they send a message to the Commons that they are ready to proceed upon the impeachment. It is still open to the accused person to offer matters in arrest of judgment, and for this purpose the managers attend the House of Lords, and the accused is brought to the bar. Then the Speaker of the House of Commons demands judgment, and it is pronounced by the Lord who presided at the trial.

**Execution of sentence.** The execution of the sentence pronounced by the Lords is like the sentence of any other criminal court, dependent upon the pleasure of the Crown. Although an ordinary prosecution is at the suit of the Crown, whereas an impeachment is at the suit of the Commons, the Crown is not thereby ousted of its prerogative of pardon. The King can pardon a person condemned upon an impeachment, or remit a part of the sentence, and has exercised this prerogative in various cases.

Some points have arisen in cases of impeachment which, after some controversy, appear to be settled by custom or statute :—

1. It was at one time questioned whether a commoner could be impeached for anything but a misdemeanour; and it was maintained that he cannot be impeached for a capital offence. In the case of Fitzharris, impeached by the Commons in 1681 for high treason, at a time when he was being proceeded against for the same act at common law, the Lords refused to proceed with the impeachment. Fitzharris was tried on indictment at common law, but the Commons protested against this action of the Lords, and in subsequent cases the objection was not raised, and the Lords resolved that the impeachment of a commoner for a capital offence should be proceeded with. Case of Fitzharris.

2. Another question has arisen as to the right of the person impeached to plead a pardon under the Great Seal in bar of the impeachment. When the Earl of Danby was impeached, in 1679, he produced a pardon under the Great Seal, given after the proceedings in the impeachment had commenced, and given with a view to bar the proceedings against the accused. The Commons protested; indeed the course taken by the King, by Lord Danby, and by the Chancellor, Lord Nottingham, was open to the gravest objection, for the Crown was made directly and personally responsible for the very same act which the Commons had made matter of impeachment<sup>1</sup>. Case of Lord Danby.

The question was set at rest by a clause in the Act of Settlement to the effect that 'no pardon under the Great Seal of England be pleadable to an impeachment by the Commons in Parliament<sup>2</sup>.'

3. The effect of a prorogation and of a dissolution of Parliament upon proceedings in an impeachment has been differently regarded at different times. Contrary resolutions have been passed by the House of Lords on these points, but the law may be stated as follows:—Proceedings in the House of Lords on an impeachment are unaffected by a prorogation or a dissolution, and this has been held without question since Warren Hastings' case in 1786. Effect of prorogation and dissolution.

<sup>1</sup> Journals of the House of Commons, ix. 575, and see vol. ii, The Crown, part i. 93.

<sup>2</sup> 12 & 13 Will. III, c. 2, s. 3.



But to avoid all difficulty with regard to the proceedings of the House of Commons, an act was passed in each of the last two cases of impeachment<sup>1</sup> providing that they shall not be discontinued by prorogation or dissolution of Parliament.

The rights  
of the  
bishops.

4. As regards the position of the bishops during the course of an impeachment, the same difficulty has arisen as in the case of the trial of a peer. The difficulty turns on the title of the bishop to his seat in the House of Lords, and on the question of 'ennobled blood.'

*Ante*, p.  
226.

The practice is, however, settled by custom and resolution of the House. The Lords have resolved 'that the Lords spiritual have a right to stay and sit in Court in capital cases, till the Court proceed to the vote of guilty or not guilty<sup>2</sup>.' And by custom the bishops sit in the House during the trial and vote on any incidental questions that may arise, but withdraw before judgment is given, entering a protest 'saving to themselves and their successors all such rights in judicature as they have by law, and by right ought to have.'

Acts of  
attainder.

I pass over those acts, in form legislative, in substance judicial, styled acts of attainder or of pains and penalties. An Act of Parliament can, as we know, do anything. It can make that an offence which was not, when committed, an offence against any existing law; it can assign to the offender, so created, a punishment which no Court could inflict. The procedure is legislative and, as such, differs in no respect from legislation on any other matter of public importance.

### § 3. *Appellate Jurisdiction of the House of Lords.*

To discuss the history of the appellate jurisdiction of the House of Lords would lead us far into legal and parliamentary antiquities. If one may venture upon a general statement the process of its attainment may be described as follows. After the three Common Law Courts had been

<sup>1</sup> 26 Geo. III, c. 96; 45 Geo. III, c. 125.

<sup>2</sup> 13 Lords' Journ. 571.

parted from the *Curia Regis* and had acquired distinct jurisdiction in cases concerning the King's interest, or the King's revenue, or concerning suits between subject and subject, there yet remained in the King a residuary judicial power. This power was called into play where the Courts were not strong enough to do justice, or were deficient in rules applicable to the case at issue, or were alleged to have decided wrongly. The exercise of jurisdiction in cases where, from the greatness of the offender or the importance of the issue, it was thought that the Courts could not do adequate justice, seems to have assumed various forms. Such cases were dealt with by the Crown in Parliament, the Crown in Chancery, and the Crown in Council. As Parliament became more distinctly a law-making and tax-granting body, cases of this nature, when brought before it, assumed a political aspect. Appeals in Parliament were forbidden in 1 Hen. IV, and so far as this jurisdiction survived in Parliament at all it survived in the form of acts of attainder and private or personal acts. The Chancellor too, as his jurisdiction took shape, eliminated cases of this character, and they fell wholly into the hands of the Council. And the Council or the Star Chamber, as employed by Henry VII, 'brought down punishments on the heads of the great, when it was difficult to find a jury which would not be hindered by fear or affection from bringing in a verdict against them even if it could be supported by the strongest evidence <sup>1</sup>.'

Residuary  
judicial  
power of  
Crown.

Punish-  
ment of  
great  
offenders  
by Coun-  
cil.

The exercise of jurisdiction in cases where the Courts were unable to provide rules suitable to the matter in hand passed into the Chancery, which developed a supplementary body of law to meet the deficiencies occasioned by the rigidity of the Common law.

Common  
law rules  
supple-  
mented in  
Chancery.

The appellate jurisdiction in cases of error passed into the House of Lords, and is all that Parliament retained of the residuary judicial power vested in the Crown. Records were, as Lord Hale tells us <sup>2</sup>, brought from other

Error from  
Common  
law Courts  
went to  
the Lords.

<sup>1</sup> Gardiner, *Hist. of England*, i. 6.

<sup>2</sup> Hale, *Jurisdiction of the House of Lords*, c. xxii (p. 127, ed. Hargrave).

courts, sometimes to be examined *in pleno parlamento*, sometimes *coram praelatis, proceribus et magnatibus in parlamento*.

And ap-  
peal from  
equity  
Courts.

In the reign of Henry IV the Commons requested to be relieved of the judicial business of Parliament<sup>1</sup>, and the Lords alone have exercised this jurisdiction. Appeal lay to the House of Lords by writ of error from the Common Law Courts, alleging error of law appearing upon the face of the record. Early in the seventeenth century the House assumed, and (after some conflict with the House of Commons in the reign of Charles II) continued to exercise jurisdiction in cases of appeals from decrees in equity<sup>2</sup>. Such an appeal was made by way of petition and not by writ of error, and was of the nature of a rehearing, though no new evidence was admitted.

Proceedings in Error before the House of Lords have been abolished by the Appellate Jurisdiction Act, 1876, and all appeals take place by way of a rehearing on petitions in a form provided by the Act, and by rules made in pursuance of the Act<sup>3</sup>; this procedure need not concern us here.

Its effect.

But it should be noted that the Appellate Jurisdiction Act, 1876, places the jurisdiction of the House of Lords upon a statutory basis, and determines the constitution of the Court in so far as it provides that no appeal shall be heard unless there are at least three members present who have judicial experience of the kind described in the Act. A sitting of this Court is, however, a sitting of the House of Lords; the forms of giving judgment follow the forms of carrying a motion on any other subject; and the Appellate Jurisdiction Act, with its amending Acts<sup>4</sup> of 1887, may be said to have been directed not so much to changing the character, as to securing the efficiency of that branch of the High Court of Parliament which acts as a final Court of Appeal. Of its functions in that

<sup>1</sup> Stubbs, Const. Hist. iii. 21 and 477.

<sup>2</sup> *Shirley v. Fagg* (1675), State Trials, vol. vi, p. 2122.

<sup>3</sup> 39 & 40 Vict. c. 59. For the forms of appeal, see Wilson, Judicature Acts (ed. 7), p. 803.

<sup>4</sup> 39 & 40 Vict. c. 59; 50 & 51 Vict. c. 70.

capacity it will be proper to speak in dealing with the Courts.

#### § 4. *The Right of Petitioning.*

The right to petition was said by one of the Judges in the Seven Bishops' case to be 'the birthright of the subject': in the Great Charter the King promised that he would not deny or postpone justice to any one, and thus whosoever in the thirteenth or fourteenth centuries wanted by peaceable means to get anything which was not recoverable in the courts of law, addressed a petition to the King in that great council of which Parliament was at first regarded as a session. Legislation itself was, as we have seen, for a long time initiated by petition of the Commons or Clergy to the King in Council; individuals addressed the King in his great Council or in Parliament; and it was held that wherever 'from the poverty of the petitioner, the power of his adversary, the insufficiency of the law, or any other similar cause, he could not obtain redress, then the Supreme Court of Parliament was to give him a speedy and effectual remedy'. For the assortment of these petitions different arrangements were made from time to time. Edward I appointed receivers and triers, and as the procedure of Parliament became organized, its first business upon opening was to hear the names of the receivers and triers of petitions appointed by the King from among the Lords of Parliament.

The receiver's duty was to be accessible to all persons who had complaints to make, such persons being invited by public proclamation, and to transmit their petitions, when received, to the triers. The triers assorted the petitions, handing over each to its appropriate tribunal, the Judges, the Chancery, the Council, or Parliament.

Strangely this practice survived until 1886 in the procedure of the House of Lords. At the commencement of every Parliament receivers and triers of petitions were appointed. The receivers were judges or masters in the

Petitions  
asking for  
legal  
remedies.

Receivers  
and triers  
appointed  
until 1886.

Select Committee on Public Petitions, 1833.

ANSON PARLIAMENT

B b

Courts; the triers were chosen from among the temporal peers <sup>1</sup>.

Petitions passed out of this stage as the functions of the Courts, the Chancery, the Council, and the Parliament became definite. The suitor then went direct to the place where a remedy was attainable.

By the end of the reign of Richard II the Chancery had built up an equitable jurisdiction supplementary to that of the Common Law Courts: the King's Council, too, was now clearly distinct from Parliament; among its other functions it afforded a remedy to suitors who were too poor to meet the charge of litigation in the Common Law Courts or were oppressed by persons too powerful to be dealt with by the ordinary process of law <sup>2</sup>. The High

<sup>1</sup> The entry appears upon the Journals of 1880 as follows:—

'Les Recevours des Petitions de la Grande Bretagne et d'Irlande :

'Messire Alexander Edmund Cockburn, Chevalier et Chief Justicer de Banc Commune.

'Messire Robert Lush, Chevalier et Justicer.

'Messire Henry William Frayling, Ecuyer.

'Et ceux qui veulent delivre leurs Petitions les baillent dedans six jours prochainement ensuivant.

'Les Recevours des Petitions de Gascoigne et des autres terres et pays de par la mer et des Isles.

'Messire Fitzroy Kelly, Chevalier et Chief Baron de l'Exchequer de la Reyne.

'Messire Charles Edward Pollock, Chevalier et Justicer.

'Messire John Walter Huddleston, Chevalier.

'Et ceux qui veulent delivre leurs Petitions les baillent dedans six jours prochainement ensuivant.

'Les Triours des Petitions de la Grande Bretagne et d'Irlande;

'Le Duc de Bedford.

'Le Duc de Devonshire.

'Le Marquis de Lansdowne.'

[And twenty-one other peers.]

'Touts eux ensemble, ou quatre des Seigneurs avantditz, appellant aux eux les serjeants de la Reyne, quant sera besoigne, tiendront leur place en la Chambre du Tresorier.

'Les Triours des Petitions de Gascoigne et des autres terres et pays de par la mer et des isles:'

[Then follows a list of twenty-one peers.]

'Touts eux ensemble, ou quatre des Seigneurs avantditz, appellant aux eux les serjeants de la Reyne, quant sera besoigne, tiendront leur place en la Chambre du Chambellan.'

<sup>2</sup> Vol. ii, *The Crown*, part i, pp. 69-71.

Court of Parliament was no longer the resort of suitors who desired a remedy for individual grievances. Their place was taken by suitors of another sort, who desired to use the legislative powers of Parliament to obtain a *privilegium*, a change of the law for their benefit, or an exemption from its provisions. From the time of Henry IV such suitors become frequent, addressing themselves chiefly to the Commons, sometimes to both Houses of Parliament, sometimes to the King in Council. But such petitions, to whomsoever they were addressed, were met and dealt with by legislation, which received the assent of Crown and Parliament.

Petitions  
asking for  
*privilegia*.

Private bill legislation was simpler in its objects than it is now, though similar in its character. An estate act, a divorce act, a naturalization act, are modern instances of the limited kind of *privilegia* which petitioners sought when they first asked Parliament to alter the law on their behalf. A railway or canal bill, though conferring exceptional rights on a corporation, may affect in its operation the proprietary rights of very many, and the comfort or prosperity of a large portion of the community. The line between public and private legislation is less easily drawn than it was in the early days of private petitions.

But I have so far spoken only of petitions of two kinds—petitions which asked Parliament for a remedy afterwards given directly by the Courts or the Council, and petitions which asked for changes or exemptions from the law on behalf of individuals.

What are called public petitions, that is, petitions complaining of public grievances, and asking for some change in the general law, or some legislation to meet new circumstances, are not common before the seventeenth century.

Public  
petitions,

A Committee of Grievances, to which petitions were referred, was appointed by the House of Commons in 1571, and throughout the reigns of James I and Charles I entries appear in the Journals of the House regulating or referring to the proceedings of this Committee. In January, 1640, we find this entry:—

‘Members added to the Committee for sorting petitions, and are specially to consider of and to sort such petitions as concern the public.’

Such petitions multiplied during the first years of the Long Parliament, and after the Restoration it was thought well to restrict tumultuous petitioning on matters of public policy.

13 Car. II, st. 1, c. 5, prohibits under penalty of £100—

legal re-  
strictions  
on pre-  
sentation,

(1) The signing of petitions to the King or either House of Parliament for any change in Church or State by more than twenty persons, unless approved, in the country, by three justices of the peace or a majority of the grand jury sitting at assizes or quarter sessions, in London by the Mayor, Aldermen, and Common Council :

(2) The presentation of a petition by a company of more than ten persons.

The Bill of Rights asserts generally that :—

‘It is the right of the subjects to petition the King, and all commitments and prosecutions for such petitioning are illegal.’

The statute law relating to petitions is thus of little moment ; for the Act of Charles II seems to be construed as directed not against petitioning, but against the presentation of petitions in a tumultuous manner ; while the Bill of Rights merely asserts a general right to petition the King. It is more important to follow the dealings of the Lords and the Commons with regard to petitions submitted to them.

right of  
commoner  
to present  
them,

As to the respective rights of petitioners to petition, and the Commons to deal with such petitions, the House declared the principles on which it would act in two resolutions passed in 1669, which run thus :—

‘That it is an inherent right of every commoner in England to prepare and present Petitions to the House of Commons in case of grievance, and the House of Commons to receive the same.’

right of  
Commons  
to reject  
them.

‘That it is an undoubted right and privilege of the Commons to judge and determine concerning the nature and

matter of such petitions, how far they are fit or unfit to be received.'

The right to make and present petitions, and the right to receive and consider petitions was so far clearly set forth, but it has been a matter of increasing difficulty to deal with petitions as they became more frequent.

Every petition must be presented to the House by a member, and the presentation, the reading and often the discussion of petitions made inroads upon the time of the House, which eventually needed limitation. Petitions had to be presented before 10 in the morning: at that hour, fifty years ago, members who had petitions to present came down and balloted for places; if a member came out high on the list he might get his petition presented and read, and, if need be, discussed that evening. If he got a low place on the ballot, the time allowed for the reception of public petitions might, owing to pressure of the public business of the House, be too short to enable him to present his petition, and he would have to reappear at 10 a.m. the next day to take his chance of another ballot.

The numbers of petitions steadily increased. In the five years ending 1789 it was 880. In the five years ending 1831 it was 24,492. In the five years ending 1877 it was 91,846. The cost of printing petitions amounted between 1826-1831 to £12,000.

To remedy these troubles the House has framed various rules. A Select Committee is now appointed, in pursuance of a resolution of February 20th, 1833, to which are referred all petitions except such as relate to private bills. The duty of this Committee is to classify, to abstract, and to report. Its reports are issued twice every week during session, and the Committee has power to direct the printing of a petition *in extenso*, and to limit its circulation to members of the House<sup>1</sup>.

As a consequence of this process of classification and abstracting of petitions by the Committee, the House has been able to economize its time in the presentation of

<sup>1</sup> Standing Orders, 76-80.



petitions, and by standing orders of 1842 and 1853 to limit the dealings with a petition on its presentation by a member to a statement of the parties from which it comes, the number of signatures, the material allegations and the prayer with which it concludes. No debate is allowed, but the petition if required to be read may be read by the clerk of the House. The rule as to debate may be set aside, and the petition discussed if it should disclose a case of urgency for which an immediate remedy is required<sup>1</sup>.

Form and  
matter of  
petitions.

It remains to consider how the House will deal with Petitions which are in form insufficient, or in matter such as the House considers 'unfit to be received.'

In form a petition must satisfy certain requirements. It must be written, it must be free from erasures or interlineations, it must not be a simple memorial or remonstrance, but must conclude with a prayer.

In matter it must be respectful of the privileges of the House, and free from disloyalty or expression of intention to resist the law. Beyond this the inclination of modern times is to allow the widest latitude to petitions.

Cases of  
rejection.

One may profitably compare the Kentish Petition with a somewhat less celebrated, though at the time notorious, petition of the year 1875.

The  
Kentish  
petition.

The Kentish Petition<sup>2</sup>, drawn up on the 29th of April, 1701, and signed by all the Deputy Lieutenants of the county present, more than twenty Justices of the Peace, and a large number of freeholders, was intended to urge the Commons to greater dispatch of business, and to enable the King to fulfil his treaty obligations with the States General. It concluded with a prayer 'That this House will have regard to the voice of the people: that our religion and safety may be effectually provided for; that the loyal addresses of this House may be turned into bills of supply; and that His Majesty may be enabled powerfully to assist his allies before it is too late.'

<sup>1</sup> Standing Orders, 76-80.

<sup>2</sup> 13 Commons' Journals, 518.

On this petition the following resolution was passed—  
'That the Petition is scandalous, insolent and seditious, tending to destroy the Constitution of Parliament, and to subvert the established Government of this realm.'

The gentlemen who presented the petition were voted guilty of a breach of Privilege, and were imprisoned by order of the House.

The Prittlewell Petition <sup>1</sup> was presented in the year 1875, The and related to the conduct of the three judges who presided at the trial at bar of Orton, the claimant of the Tichborne estates. But the petition did not merely impugn the good faith of the judges, it suggested that the Speaker had not been impartial in dealing with complaints of the conduct of this trial. <sup>Prittlewell petition.</sup>

The Select Committee on public petitions drew the attention of the House to this document, and after an interesting debate the order that the petition should lie upon the table was read and discharged.

It would seem from the tenor of the debate that the ground of objection to the petition was the reflection on the Speaker's impartiality. It would not have been a ground for rejection that the conduct of the judges was commented upon with freedom, for the precedents of the last thirty years go to show that the House wisely allows petitioners to express anything short of an intention to break the law, or a contempt for the body to which they appeal for redress.

A petition may be rejected at once, upon its presentation by the member in charge of it; or, as in the case of the Prittlewell petition, it may be ordered to lie on the table, and when attention is drawn to it by the Select Committee, the order may be discharged and the petition thereupon rejected.

<sup>1</sup> Hansard, vol. cccxiii, p. 976.

§ 5. *Committees of Inquiry.*

Origin of  
the prac-  
tice.

The practice of inquiring into the conduct of individuals or of departments of government by means of special or select committees of the House is said by Mr. Hallam<sup>1</sup> to have begun in the year 1689. The mismanagement of the war then being carried on in Ireland was the cause of this inquiry being instituted, and upon its report, which reflected severely upon the conduct of Colonel Lundy, the governor of Londonderry, the House addressed the Crown with a request that he might be sent to England for trial on the charge of treason.

Need of  
power to  
adminis-  
ter oaths.

This right of inquiry, since frequently exercised, depended for its efficacy on the exercise of parliamentary privilege to enforce attendance of witnesses and production of documents; but it was for a very long time hampered by the want of power in the House or in any committee of the House to administer an oath. Gradually, and for certain occasions, the power was given to committees to examine witnesses upon oath. The first concession of this right was made by the Grenville Act, 1770, in the case of committees for trying disputed returns; the power was subsequently given to committees upon private bills; and finally, by 34 & 35 Vict. c. 83, the House of Commons may administer an oath to a witness at the Bar of the House, or any committee of the House may administer an oath to the witnesses examined before it<sup>2</sup>.

The scope and character of the inquiry may vary greatly and the value of the inquiry may vary in proportion. A committee may be appointed to take evidence as to the working of a department, as to the propriety of bringing new matters under the supervision or control of the executive, as to the causes of a disaster, as to the conduct of an individual.

<sup>1</sup> History of England, iii. 143.

<sup>2</sup> If a witness contumaciously refuses to answer questions addressed to him by the Committee, the matter is brought before the House as one of Privilege, and the witness is brought to the Bar: see the case of Mr. Kirkwood, *Times* newspaper for July 18, 1897.

'A Committee,' said Mr. Gladstone in 1855, 'is extremely well fitted to investigate truth in its more general forms, by bringing every possible form of thought to bear on the points before it; but it is also well fitted for overloading every question with ten or fifteen times the quantity of matter necessary for its consideration; and therefore as ill as possible calculated for those rapid searching and decisive inquiries which have practical remedies rather than the arriving at general propositions for their main business<sup>1</sup>.'

These words indicate the limits within which committees of either House may profitably work. They may collect facts with a view to future legislation; they may be used to ascertain a specific fact, as when a committee examined the physicians of George III with a view to the ascertainment of his mental condition. But they may also trench upon judicial or executive functions. Thus on the 29th January, 1855, the House of Commons determined to appoint a committee to inquire 'into the condition of our army before Sebastopol, and into the conduct of those departments of Government whose duty it has been to administer to the wants of that army.' This vote of the House of Commons was treated as a vote of censure by the Government of Lord Aberdeen. He and his colleagues resigned, and Lord Palmerston became Prime Minister. But he proposed to treat the vote of the 29th of January not merely as a vote of censure on Lord Aberdeen's Government, but as an expression of intention on the part of the House to inquire into the past and present conduct of the war in the Crimea. The committee was appointed, but the acquiescence of Lord Palmerston in its appointment cost him the adhesion of three prominent members of his Government, Sir James Graham, Mr. Sidney Herbert, and Mr. Gladstone. They urged that to hold such an inquiry in the midst of war would necessarily paralyze the departments of government which were engaged in superintending and providing for our military operations, that it would

<sup>1</sup> Hansard, cxxxvi. p. 1837.

be unfair to the officers who were conducting them on the spot, and that if the appointment of the committee meant anything, it meant that the House proposed to interfere with the management of the war.

'It is really,' said Mr. Gladstone, 'if it is anything practical, a committee of government, a committee too which takes out of the hands of the executive the highest, the most important, the most solemn of its functions. I am satisfied that an inquiry such as is proposed by a Committee of this House is incompatible with real confidence on the part of Parliament in those who hold executive office, and entirely incompatible with the credit and authority which ought, under all circumstances, to belong to the ministers of the Crown whatever party or political creed they may profess.'

The power of the House of Commons to criticize the action of the executive and to call ministers to account is undoubted, but it is distinguishable from the direct interference with executive action which would ensue from Parliamentary inquiries held on transactions which were in course of being carried through by ministers.

The executive can always through the agency of royal commissions hold inquiries on its own account, and is responsible for the appointment of such commissions and the conduct of their inquiries.

#### § 6. *Address for the removal of servants of the Crown.*

The report of a committee of inquiry may form the foundation, though it need not be the only foundation, for an exercise of the judicial functions of Parliament.

Mode of  
procedure  
for re-  
moval of  
an officer  
of state.

Certain officers of state, the most important and conspicuous of whom are the judges<sup>1</sup>, are removable upon an address to the Crown made by both Houses of Parliament. The ground of proceedings by address may be the petition of an individual, the motion of a member, or the report of

<sup>1</sup> By 12 & 13 Will. III, c. 2.

a Select Committee appointed in consequence of such petition or motion.

These proceedings assume a judicial character, and it would appear proper that they should begin in the Commons. For the Commons are especially 'the grand inquest of the High Court of Parliament'; and there is this further reason against such proceedings being commenced in the Lords, that if when the matter came before the Commons they thought it a case for an impeachment, the Lords would be in the unsatisfactory position of judges who had pre-judged the case on which they were called to decide.

The House of Commons, having appointed a committee to inquire into the truth of charges made, whether by petition or on motion, and having received the report of the committee, hears the official complained of in his defence. It may accept without further inquiry the report of the committee<sup>1</sup>, but the better opinion seems to be that the evidence against the person charged, although it has already been taken by the committee, should be heard at the bar of the House.

If the House of Commons is satisfied of the truth of the charges made, an Address to the Crown is drafted praying the removal of the officer charged, and this, when agreed to, is communicated to the Lords. They, if they please, inquire again into the evidence, and, if satisfied, agree to the Address and send a message to the Commons to that effect. Thereupon members of the two Houses are deputed to present the Address to the Crown.

In cases of the sort described, Statute has provided for the exercise by the Houses of this judicial power. In the particular instance of the judges the Act of Settlement introduced this Parliamentary control in addition to the powers of removal which the Crown possesses if a judge should misconduct himself in the business of his office. But an address for the removal of an officer of State, proffered to the Crown by either House, may be no more

<sup>1</sup> See the case of Sir Jonah Barrington, set forth at length in Todd's Parliamentary Government in England, II. 736 (867 in ed. of 1889).

than an expression of disapproval of the conduct of the executive generally, or of an individual member of it in particular.

§ 7. *Parliament and the Ministers of the Crown.*

Address  
for re-  
moval of  
minister,

In discussing the limits which should be assigned to inquiry by Select Committees, we came upon the relations of the Houses of Parliament to the Ministers of the Crown, and touched the point at which danger arises from the interference of a popular assembly with the action of the executive. That point is not easy to define. The modern practice of questioning Ministers of the Crown in either House, joined to the facility with which information of some sort on all subjects is procurable through the post, the telegraph, and the press, would seem to keep the executive under a standing committee of inquiry. And yet it is also certain that Parliament recognizes to the full the importance of non-intervention in matters of government, and that on the rare occasions when it has encroached upon executive functions, such encroachment, as in the case of the Sebastopol Committee, was the result of error rather than intention. Disapprobation of a minister, of a department, of a policy, may be and is from time to time expressed, but interference with the action of a minister, or of a department, or with the development of a policy is, on the whole, carefully avoided.

Yet an expression of confidence or disapproval is a judgment passed by one or other House upon the Ministers of the Crown. It may relate to a matter for which an individual minister is responsible, a matter unconnected with the general character or policy of the government. In such a case the retention of office by the individual may alone be affected by the vote. Or it may relate to matters for which the Ministry considers itself collectively responsible, and may thus bring about the retirement of the Ministers of the Crown and a change in the policy of the country.

Yet it would seem that the House of Commons is as reluctant to interfere in the composition as it is in the action of the executive. For when the confidence of the nation in a Ministry is withdrawn, this is indicated either by the unmistakable verdict of the polling booths, as in 1868, 1874, 1880, 1886, or by an adverse vote in the House of Commons on some matter which Ministers regard as vital. There are but three instances, all in the late reign, of a definite expression of opinion by the House of Commons that the Queen should change her Ministers—of a definite vote by the House to the effect that it is expedient that Ministers should possess the confidence of the House and of the country, and that such confidence is not reposed in the present Ministers of the Crown. Votes of this nature having been passed in 1841, in 1859 and in 1892, led in each case to the resignation of the Ministry.

or of  
want of  
confidence  
in minis-  
try.

But the effect and legal character of a vote of this nature must be carefully distinguished from an address such as that for the removal of a judge. The latter is a statutory remedy given to the estates of the realm for the security of the due administration of justice; the former is a mode of expressing disapproval of the individuals whom the Crown employs for the time being in the transaction of the business of government.

Differs  
from an  
address for  
removal of  
a judge.

And thus we are led by graduated stages from the direct and legal exercise by Parliament of judicial power, in cases of supreme importance, to the exercise of that constant criticism and control of the executive which our system of Cabinet government puts into the hands of the legislature. By questions addressed to Ministers of the Crown, by motions for papers on matters of present interest, the members of either House can keep a check on current business and obtain explanation of its conduct, so far as is not inconsistent with the public advantage. By votes of censure, or by votes expressing want of confidence, by adverse majorities in important questions, Parliament can pronounce judgment on those officers of state to whom the King has entrusted the conduct of affairs.

Control of  
Parlia-  
ment over  
executive ;

But here we pass outside the region of law and come to



a matter  
of con-  
vention.

those conventions or constitutional understandings which, as Professor Dicey has said, 'may be expressed with ease and technical correctness in the form of regulations in reference to the exercise of the prerogative<sup>1</sup>.' As such they should be more properly deferred for treatment when I come to deal with the prerogative of the Crown in respect of the choice of Ministers and the determination of policy. But here it may be well to say this much.

Ultimate  
legal  
sanction.

Such control as the House of Commons exercises over the choice of Ministers by the Crown rests, so far as it has any legal basis, on precisely the same footing as the necessity for annual Sessions of Parliament. If Parliament does not meet, the army cannot be maintained, and much of the revenue of the year cannot legally be paid away. If Parliament does meet, the House of Commons has power, if so minded, to refuse to pass the Army Bill and the Appropriation Bill. The necessity for summoning a Parliament and the necessity for keeping on good terms with that Parliament are therefore the same; and I have spoken of the House of Commons as wielding power in these matters, because, though the refusal of *either* House to pass these necessary measures would be fatal to them, the Crown can, as we have seen, alter the composition of the House of Lords by a creation of Peers, while it can only alter the composition of the House of Commons by an appeal to the electorate.

If therefore the majority of the House of Commons and the Ministry are hopelessly at variance, and the House of Commons expresses its opinion by votes of censure, the Crown must do one of three things: it must either keep its Ministers and its Parliament, with the intention, should the necessary statutes not be passed, of maintaining an army, and spending the public money in defiance of law; or it must keep its Ministers and dissolve its Parliament; or it must keep its Parliament and change its Ministers.

The legal  
sanction  
not re-  
sorted to;

But practically these sanctions are not contemplated when a Ministry is changed. A Ministry may last for

years which is in a permanent minority in the House of Lords, yet the House of Lords does not attempt, and nobody ever supposes that it will attempt, to throw out the Army Bill. When a Ministry is censured by the House of Commons, or is beaten on a division in a matter which it has declared to be vital to its existence, nobody ever supposes that it will remain in office and violate the law. We expect that the Ministers will tender their resignations unless they have reason to believe that the House of Commons does not represent the feeling of the country, and in that case they will ask the King to dissolve Parliament, and will appeal to the electorate.

But we must not forget that the possible violation of the law is not the only reason why a Ministry should retire when it is shown to have lost the confidence of the House or of the country. Ministers are not only the servants of the King, they represent the public opinion of the United Kingdom. When they cease to impersonate public opinion they become a mere group of personages who must stand or fall by the prudence and success of their action. They may have to deal with disorders at home or hostile manifestations abroad; they would have to meet these with the knowledge that they had not the confidence or support of the country; and their opponents at home and abroad would know this too <sup>1</sup>.

We arrive then at this point, that the King, as represented by his Ministers, must, by the conventions of the constitution, work in harmony with public opinion as represented by the members of the House of Commons. The legal necessity lies in the background; it forms an ultimate sanction which is not often present to the minds of those who act upon it.

but necessitates harmony of Ministers and Commons,

<sup>1</sup> It is possible for a Ministry to remain in office for a considerable time after undergoing a vote of censure without any risk of breaking the law. Lord Salisbury's government, in 1892, might have held office during the recess, for a period of five or six months, after a vote of want of confidence had been passed by the House of Commons. The practical and vital objection to such action on the part of a Ministry would be found in the weakness of its position if it had to discuss critical diplomatic questions with foreign powers.

as representing  
Crown  
and  
People.

The conventional necessity is wholly outside the contemplation of law. The will of the electorate can only be expressed through its representatives, just as the will of the Crown can only be expressed through its Ministers, and what is sometimes talked of as 'the mandate of the constituencies' has no legal value.

A member of the House of Commons represents not merely the constituency which has returned him to Parliament, but the entire kingdom<sup>1</sup>. He is bound to respect the wishes of his constituents, partly because he may have engaged himself at the time of his election to try and promote them, partly because he may fear rejection on the next occasion of his being a candidate if he does not act up to his professions. But he is bound also to remember that he represents the Commons of the realm, and that the interests of his constituency are but a fraction of the interests which he has in charge.

If therefore a Ministry were placed in a minority in the House of Commons on a vote of censure, this would be an indication, probable though not certain, that the majority of the electorate desired to see the policy of the country directed by other hands: it would foreshadow remotely certain legal difficulties which have never as yet been allowed to arise.

Verdict of  
a general  
election.

Under the existing conditions of our political life the electorate at a general election decides which party is, for some years, to govern the country. The Ministers who are the leaders of this party are not likely to be placed in a minority, under ordinary circumstances, during this time.

Their majority may become attenuated by adverse bye-elections: their followers may grow careless and indolent: some great new issue may suddenly arise which breaks existing party lines, such as Home Rule in 1886, and Tariff Reform in 1903: or an advantage may be taken of some chance combination of circumstances, which combined with carelessness on the part of the ministerial majority, may by what is known as a 'snap vote' place them, for the moment, in a minority on a division.

Coke, 4 Inst. 14.

Apart from these exceptional circumstances Ministers are usually secure of the support of those who were sent to support them by the electors.

Relations  
of  
ministers  
and  
followers.

The followers of the party in power do no doubt hold the life of the Government in their hands. They can end it by a withdrawal of support. But the Government, in turn, holds in its hands the Parliamentary existence of its supporters. The Prime Minister by claiming a dissolution can send his refractory followers to their constituencies; and we are beginning to realize, since 1885, the proverbial fickleness of a democracy.

Here we pass outside the region of Statute or Common Law or constitutional convention.

We are in the habit of saying that a Ministry lives under the constant criticism of the House of Commons, and can continue to live only by the goodwill of the House of Commons. But the criticism is the criticism of the minority, and the goodwill of the majority has come, through the agency of party organization, to be somewhat mechanical and unreal. It would be more true to say that the House of Commons has become a machine for expressing the opinion of the constituencies, as that opinion, organized and moulded by party management, was formulated, or was supposed to be formulated, at the preceding general election.

Criticism  
comes  
from  
minority.

The mediaeval House of Commons demanded that the officers of state should be chosen by themselves: the House of Commons in the seventeenth century used the process of impeachment as a check on Ministers whose policy displeased them: from the Revolution onwards, the House in theory, and to a large extent in practice, determined the choice of the men whom the Crown should employ and exercised a control over their policy and their continuance in office. Throughout the eighteenth century, and indeed until after the Reform Act of 1832, the influence of the Crown was a factor, sometimes a potent factor, in the construction and life of a Ministry; but from 1832 to 1885 we may say that this theory was in fairly close correspondence with practice.

Power of  
constitu-  
encies.

In recent times the power thus exercised by the House of Commons has passed, in great measure, to the electorate, who can only use it at intervals, and only with effect at a general election. Party organization combines with electoral conditions to narrow the choice of constituencies to the strict supporters of definite programmes; while party discipline controls the action of the majority in the House, and while it cannot always silence criticism can ensure that criticism does not take effect in the form of an adverse vote.

But formally the support of the House of Commons is necessary to the existence, to the executive energy, to the legislative activity of a Government, and it is not merely fanciful to associate this constant opportunity, still enjoyed, for questioning, surveying, and in a more limited degree discussing the action of a Government with the duties connoted in the term 'the High Court of Parliament.'

The following are the references to changes made in this volume :

	PAGE	
Introduction.	11, 12.	Legislative sovereignty and the Cabinet.
Chapter III.	46.	Parties to legislation.
	73.	Duration of Parliament.
	74.	Demise of the Crown.
Chapter IV.	149-151.	Duties of Speaker.
	189.	Payment of members.
Chapter V.	237-239.	Reform of the House of Lords.
Chapter VI.	266-267.	The Parliament Act and Debate.
	269-271.	Money Bills.
	283-290.	The Houses in conflict, and the prerogative of making peers.
Chapter VIII.	357.	Influence of the Crown on the House of Lords.

Oct. 1911



# INDEX

## A.

**Aberdeen, Lord :**  
on prerogative of dissolution of Parliament, 305.  
vote of censure on Government of, 377.

**Abbot :**  
the mitred abbots in the House of Lords, 34.  
excused attendance, not being barons, 197 n.

**Abjuration :**  
oath of, 90, 100.

**Absence :**  
leave of, 257.

**Access :**  
to the Crown, a privilege of Commons, 68, 146, 153, 154.  
of Lords, 231.

**Act :**  
bill containing form of Act, 249.  
bill turned into Act by assent of Crown, 296, 313.

**Act of Settlement :** *see* Statute.  
as to placemen, 8, 38, 41, 83.

**Act of Supremacy :** *see* Statute.

**Address :**  
in answer to King's speech, 65, 70.  
mode of presentation, 70.  
amendments to, 65.  
for removal of officers of House of Commons, 151.  
for removal of judges or other servants of the Crown, 379.

**Adjournment :**  
of either House, 70.  
cannot be required by Crown, 70.  
of House of Commons, 256.  
in case of grave disorder, 262-3.  
of debate in House of Commons, 256.

**Admonition :**  
a mode of punishment by Commons, 177.

**Affirmation :**  
in lieu of Parliamentary oath, 64, 91, 92.

**Agent :**  
for purposes of an election, 89, 125.

**Aid :**  
sole gift of Commons, 269.  
right of King to levy, 334.

**Alien :**  
cannot sit in House of Commons, 80.  
nor exercise franchise, 126.  
nor be summoned to House of Lords, 215.  
nor acquire any political capacity except by naturalization, 81.

**Allocock, Mr. :**  
case of, 79.

**Allegiance :**  
oath of, 63, 91, 92, 100.

**Alms :**  
receipt of, a disqualification for franchise, 126.

**Amendments :**  
to public bill in Commons, 261.  
in Lords, 281.  
communication of amendments between the Houses, 281.  
to money bills, 270.  
by Lords, 270, 288 n.  
to the Address to the Crown, 65.

**Anne :**  
in Parliament, 310.  
her creation of peers, 208, 356.  
refusal of assent to bill, 316.

**Appeal :**  
Lords of, 75, 192, 227.

**Appellate jurisdiction :**  
of House of Lords, 227, 366-8.

**Appellate Jurisdiction Act, 1876,**  
227, 228, 233, 368.

**Appropriation of supply :**  
began in reign of Charles II, 36.  
developed under William III, 40, 41.  
necessitates annual sessions of Parliament, 278, 303, 304.

**Appropriation Act :**  
legalizes the expenditure of public money, 275, 278, 303, 382.  
form of enacting clause, 280.  
form of royal assent to, 316, 317, 318.

**Army Act :**  
discipline of troops secured by, 8.



- Army Act :**  
necessitates annual session of Parliament, 304.
- Army Council :**  
constituted by letters patent, 8.
- Arrest, freedom from :**  
a privilege of the House of Commons, 68, 146, 154-6.  
limits of, 154.  
history of, 155.  
extent of privilege as to time, 155.  
a privilege of House of Lords, 231.
- Ashby v. White :**  
the question of privilege raised therein, 146, 181, 185.
- Atheist :**  
how affected by Parliamentary oath, 91, 92, 93.
- Attainder :**  
Acts of, 359, 366.
- Attendance :**  
writs of, 57.  
of members of Commons, 257.  
of Lords in person or by proxy, 232.
- Attorney General :**  
how summoned to Parliament, 55.
- Austin :**  
on sovereignty of Parliament, 1, 18.  
his view of executive and legislature, 6.
- B.**
- Bagehot, W.,** 13, 25, 236.
- Balfour, A. J. :**  
on closure by compartments, 264 n.  
his resignation, 306.
- Ballot Act :**  
prescribes form of writ of summons, 59.  
and mode of election, 137-8.
- Bankruptcy :**  
disqualifies for election to House of Commons, 88.  
and for summons to House of Lords, 215.  
disqualification for either House, 168, 215.
- Bar :**  
of House of Commons, summons to, 149, 151, 177.  
bill presented at, 259.
- Baron :**  
title of, 229.
- Baronage :**  
an estate of the realm, 49, 192.  
how it originated, 193.  
the *major barones* of John, 193.  
the baronage of Edward I, 193.
- Baronage :**  
how created, 194, 195.  
hereditary, 196.  
how connected with tenure, 194, 197.
- Barony :**  
feudal liabilities of, 193-4.  
by tenure, 197, 204-7.  
how far alienable, 197.  
acquired by writ of summons, 196, by patent, 217.  
tenancy by the curtesy in, 198.  
surrender of, 198.  
decisions respecting, 198-200, 202-4.  
settlements of, 197, 205-7.  
in relation to bishoprics, 225, 226.
- Bate :**  
case of, 334, 335, 336, 338.
- Beauchamp, Lord :**  
claimed Parliamentary franchise, 125.
- Benevolence :**  
forbidden by Petition of Right, 338, 340.
- Berkeley peerage :**  
settlements of, 197, 205.  
decisions concerning, 204, 205-7.
- Bill :**  
legislation by, 249-51.  
three readings, 251.  
Public Bill, 65, 69, 254, 258-67, 281-7.  
modes of introducing, 258.  
in the Commons, 259-67.  
bills which must originate in committee, 260-1.  
modern conditions limit discussion of, 288-9.  
report stage of, 261.  
in the Lords, 281-2.
- Money Bill, 268-81.**  
history of, 268-71.  
must originate in resolution of committee, 268, 273.  
and on recommendation of the Crown, 271.  
form of, 280.
- Private Bill, 255, 291-6.**  
royal assent to, 313-16.
- Bill of Rights :**  
general purport, 37, 38.  
as to freedom of speech, 159.  
dispensing power, 330-1.  
suspending power, 331-3.  
taxation, 341.  
right of petitioning, 372.
- Bishop :**  
mode of summons, 56.  
a member of Witan, 192.  
of Feudal Council, 192.

- Bishop :**  
a Lord of Parliament, 210.  
mode of appointment, 223.  
doubtful if a temporal baron, 225.  
may resign *see*, 227.  
at trial of peers for crime, 227.  
at impeachment, 366.
- Black Rod :**  
Gentleman Usher of, 65, 230.
- Blackstone, Sir W. :**  
on definition of the franchise, 102.  
privilege of Parliament, 174.  
on judicial rights of bishops, 227.
- Borough, Parliamentary :** *see*  
**Franchise.**  
when first represented, 49.  
forms of writs for electing mem-  
bers, 57, 59.  
mode of election in, 102, 103,  
109, 138.  
franchise in before 1832, 107,  
393-4.  
qualifications for, 107, 108, 109.  
causes of change in, 110-11, 343-6.  
in Scotland before 1884, 115.  
in Ireland before 1884, 115-16.
- Bradlaugh, Mr. :**  
his claim to make affirmation  
instead of oath, 91-3.  
his claim to be sworn, 92, 175, 186.
- Breach of peace :**  
unprotected by privilege, 154.
- Bribery :** *see* **Corrupt Practices.**  
of members of Parliament, 347,  
348, 350-3.  
of constituencies, 353, 354.
- Bruce, Mr. :**  
case of, 84.
- Burdett v. Abbott :**  
case of, 176, 180, 188.
- Burgesses :**  
two to be elected for each borough,  
49.  
required to reside in constituency,  
251, 344.
- Burke, E. :**  
on Economical Reform, 349.

C.

- Cabinet :**  
King retires from, 9, 42.  
growth and constitution of, 9, 40-3.
- Cairns, Lord :**  
on the Buckhurst peerage case,  
204.  
on the Irish Church Bill, 285.
- Call of the House, 257.**
- Camden, Lord :**  
on use of embargo by proclamation  
— 'a forty days' tyranny,' 325.

- Campbell, Lord :**  
on law of the peerage, 198, 207.  
on the Wenaleydale peerage case,  
234.
- Campbell-Bannerman, Sir H. :**  
his proposal to restrict power of  
Lords, 289-90.
- Candidate :** *see* **Election, Corrupt  
Practice, Nomination, Poll.**
- Catherine Howard :**  
her attainder, 314.
- Catholic :**  
disability arising from form of  
oath, 90.  
oath provided for, 90, 101.
- Chairman of Committee of Ways  
and Means :**  
his duties in respect of public  
bills, 261; of money bills, 276;  
of private bills, 294-5.  
may act as deputy Speaker, 150.  
may put question as to with-  
drawal of strangers, 162.
- Chancellor :**  
duties as to issue of writs, 53.  
at the opening of Parliament,  
61, 65.  
as to approval of the Speaker,  
62, 67.  
as to grant of privileges, 62, 68,  
152.  
on application for writ from peer,  
218.  
is Speaker of House of Lords by  
prescription, 230.  
presides at impeachment of a  
Commoner, 364.
- Chancery :**  
writs issued from, 53, 55, 102.  
returns made to, 63, 103, 139.  
claim to judge returns, 170.  
appeals from to House of Lords,  
367.
- Charles I. :**  
his dislike of constitutional forms,  
35.  
his attempt to exclude hostile  
peers from Lords, 231.  
interferes with privileges of  
Lords, 235.  
Commons grant subsidies to, 269.  
his use of proclamations, 324.  
his entry into House of Commons,  
310-11.
- Charles II. :**  
his revenue, 36.  
appropriation of grants made to  
him, 36.  
his dislike of large councils, 41.  
Parliamentary oath required in  
his reign, 63, 100.

- Charles II :**  
 duration of his first Parliament, 72.  
 conflict with House on right to choose Speaker, 147.  
 constituencies added by him, 130, 346.  
 Acts passed in reign of for frequent sitting of Parliament, 303.  
 his presence in Parliament, 310-11.
- Charter :**  
 The Great, 27, 47, 241, 339.  
 of corporate towns, 108.  
 of pardon, 326.  
 franchise conferred by, 110, 130.
- Chelmsford, Lord :**  
 on the Wilkes case, 202, 203.
- Chiltern Hundreds :**  
 acceptance of, vacates a seat, 79, 95, 186.  
 form of appointment to, 96.
- Civil List :**  
 begins after Revolution, 40.
- Clergy :**  
 how represented in the Council, 33.  
 effect of Reformation on their influence in the state, 33.  
 omitted from Magnum Concilium of John, 48.  
 how summoned to Model Parliament, 49.  
 why they ceased to attend summons, 50, 51.  
 omitted from 15 Ed. II, as necessary parties to legislation, 243, 246.  
 cannot sit in the House of Commons, 81.  
 nor Roman Catholic clergy, 81.  
 relinquishment of orders by, 82.  
 initiated legislation by petition, 246.
- Clerical Disabilities Act, 82.**
- Clerk of the Commons :**  
 discharges duties of the chair during election of Speaker, 62, 66.  
 his duties generally, 151.
- Clerk of the Crown in Chancery :**  
 writs of summons to Parliament issued from his office, 53, 58.  
 supplies Clerk of Commons with list of elected members, 63.  
 receives notice of election of Representative Peers of Scotland, 58, 62, 220.  
 receives Speaker's warrant to issue new writs, 168.
- Clerk of the Crown and Hanaper in Ireland :**  
 his duties in election of representative peers, 221-2.
- Clerk of the Parliaments :**  
 his duties at the opening of a Parliament, 63, and otherwise, 222, 230, 317.  
 his title, 151.  
 receives list of elected Scotch peers, 63, 220.
- Clerk of the Peace :**  
 his duties as to register of voters, 134-5.
- Clifton peerage :**  
 case of, 199, 211.
- Closure :**  
 by resolutions of 1881, 263.  
 of 1882, 263.  
 of 1888, 263.  
 why necessary, 264.  
 effects of, 265.  
 process of, by guillotine, 266.
- Cockburn, C. J. :**  
 in case of *Wason v. Walter*, 167.
- Coke :**  
 on disqualification of infants, 78.  
 his opinion as to House of Commons being a Court of record, 179.  
 — estate in a dignity, 203.  
 — the validity of proclamations, 323.  
 — the judicial powers of Lords and Commons, 359.
- Commission :**  
 opening of Parliament by, 61, 65.  
 reading of Queen's speech by, 65.  
 confirmation of Mr. Speaker elect by, 67.  
 for proroguing Parliament, 71.  
 for dissolving Parliament, 72.  
 to appoint deputy Speakers of House of Lords, 230.  
 to assent to bills, 313-14, 316-17.  
 of inquiry, 378.
- Commissioners :**  
 Ecclesiastical, 298.  
 for Universities of Oxford and Cambridge, 298-9.  
 for Public Schools, 298, 299.
- Commissions :**  
 in army and navy, do not disqualify for House of Commons, 83.
- Commitment :**  
 for contempt, by House of Commons, 147, 151-2.  
 extent of punishment, 177-9.  
 mode of exercise, 152, 177, 178-80.  
 source of right, 179-80.

**Commitment:**

grounds of, need not appear in warrant, 187.

by House of Lords, 232.

**Committee:**

of House of Commons—

of privileges and elections, 170.  
of selection, 260.

to decide disputed returns, 111, 171.

under Grenville Act, 171, 376.

of Supply and Ways and Means, 149, 273.

committee of whole House, 251, 260, 261.

public bills originating in, 260.

standing committees, 252, 260-1.

of Supply, 273-6.

of Ways and Means, 276-7.

of Public Accounts, 275, 279.

of standing orders, 294.

of public petitions, 375.  
select committees of inquiry, 252, 376-8.

of House of Lords—Chairman of, 294.

of privileges, 220, 221.

**Commons, House of:**

increase in business of, 10, 253.

its relations with the executive under the Plantagenets, 29, 30-1.

— the Stuarts, 34-5.

in the modern constitution, 26-43, 52, 380-6.

represents an estate of the realm, 49.

how summoned as such, 49-51.

rights of, in legislation, 241-5.

— in taxation, 52, 242, 269, and see Money Bills, Supply, Ways and Means.

procedure of, 251 et seq., and see Bill, Legislation, Procedure.

writes for election to, 57, 59.

Speaker of, how chosen, 61-2, 66-8, 147, 148.

oath or affirmation of members, 63, 69, 91-3.

disqualifications for membership, 78-101.

seat in, cannot be resigned, 94-5.

mode of election to, 102; and see Election.

officers of, 147-51.

privileges of, 145-89; and see Privilege.

business of each day in, 255-8.

adjournment of, 256.

**Commons, House of:**

modern controversies with House of Lords, 288-91.

jurisdiction claimed by, 360.

impeachment by, 363.

disagreement with Lords, how settled, 283-7.

has become a machine for expressing opinion of constituencies, 385.

**Common Law:**

its relation to the Crown and Parliament, 76.

argument from in case of impositions, 336.

in case of shipmoney, 339.

**Commune Concilium:**

its constitution as defined in Magna Charta, 27, 47.

**Comptroller and Auditor General:**

supervises expenditure of money voted for supply, 275.

**Conference:**

between Lords and Commons, 282.  
a free conference, 282.

**Confirmatio Chartarum:**

asserts right of Commons in taxation, 34, 242.

Confirmation of bishops, form of, 223.

Congé d'élire, 223.

Consecration of bishops, 225.

Consent of bishop prior to confirmation, 223.

Consolidated Fund, 276, 277-80.

**Constitution:**

the Anglo-Saxon, 25.

the Norman, 26.

English, how affected by Revolution of 1688, 38.

differs in theory and practice, 4-6.

— is unwritten, 6.

— is alterable by ordinary process of legislation, 7, 358.

executive and legislative distinct in, 8.

**Constitutional Law:**

topics of, 22-4.

**Contempt:**

commitment for by Commons, 147, 151-2.

nature of offence, 188.

**Contract:**

Feudalism based on, 32.

with government, disqualifies for House of Commons, 87, 350.

a mode of influencing members, 350.

**Convention Parliament, 39.**

how summoned, 75.

- Conventions of Constitution**, 74-6, 286, 382, 383.
- Conviction**. *See* Felony, Treason.
- Convocation** :  
   clergy used to tax themselves there, 50.  
   differs from the estate of the Clergy, 58.
- Conway, General** :  
   deprived of his commission for opposing ministry, 160.
- Copyhold** :  
   a qualification for county franchise, 106.  
   present extent of qualification, 117.
- Cornwall** :  
   representation of, 110, 343.
- Corporation** :  
   officers of, and the franchise, 108-12.
- Corrupt Practices** :  
   disqualify for House of Commons, 89.  
   for exercise of franchise, 126.  
   before 1832, 112, 350-4.
- Council, Privy** :  
   the King in Council the executive, 32.  
   how far a check on the King, 33.  
   its composition under the Tudors, 34.  
   order in Council for issue of writs, 54.  
   legislation by Crown in Council, 244, 322, 323.
- County** :  
   Parliamentary representation of, 129.  
   election of members for, 102, 103, 138.
- County Corporate** :  
   rights of, 117.
- County Court** :  
   its connection with representative institutions, 48, 51.  
   Parliamentary elections held there, 61, 102, 103; for counties and boroughs, 103.
- County Franchise** :  
   original qualifications for, 105.  
   how dealt with by Reform Act, 106.  
   by Representation of the People Act of 1867, 106.  
   by Act of 1884, 116-24.  
   in Scotland before 1884, 114.  
   in Ireland before 1884, 115.
- Crown** :  
   how controlled in action, 30-1.  
   in legislation, 31-2.
- Crown** :  
   how far checked by Council, 33.  
   its strength under Tudors, 33-4.  
   claims of under Stuarts, 34-7.  
   mediaeval and modern royalty, 38-9.  
   its loss of influence under Cabinet Government, 40, 41-3.  
   prerogatives of in respect of Parliament :  
     in summons, 53, 61, 65, 301-3.  
     in opening business, 64, 76, 309.  
     in proroguing, 71.  
     in dissolving, 72-4, 304-9.  
     in legislation, 245, 313-17, 320.  
     in taxation, 339.  
     in communication with, 311-12.  
     in creation of peers, 200-1, 207.  
     in summons of peers, 208, 215.  
     in disputed claims of peerage, 218.  
     in appointment to bishoprics, 222-3.  
     in demand of supply, 271-2.  
     limited by rules of law, 323-4.
- Crown Office** :  
   writs issued thence, 53, 55, 102.  
   returns kept there while Parliament lasts, 63.  
   returns made there, 103, 139.
- Cruise** :  
   on dignities, 203.
- Cumulative vote** :  
   used in school-board elections, 142.
- Curia Regis** :  
   its judicial powers, 367.
- Courtesy** :  
   tenancy by in a baronage, 198.
- Customs** :  
   right of Crown to levy, 335, 336, 337-9.
- D.
- Danby, Lord** :  
   case of, 365.
- Davitt, Michael** :  
   case of, 172.
- Debate** :  
   publication of, 162-7.  
   adjournment of, 256.  
   conclusion of, 258.  
   limitations of in Commons, by closure, 265-7.  
   in Lords, increased importance of, 11, 239, 266.
- Denman, Lord** :  
   on case of *Stockdale v. Hansard*, 183.

- Deputy :**  
 of Speaker, 150.  
 of Chairman of Ways and Means, 149.
- Derby, Lord,** 305.
- De Tallagio non concedendo,** 340.
- de Tocqueville :**  
 on English constitution, 6.
- Dicoey, A. V. :**  
 on sovereignty, 240, 382.
- Dispensation :**  
 distinguished from pardon, 327.  
 from imposition and forced loan, 337.
- Dispensing power :**  
 its use in mediaeval constitution, 326.  
 attempts to define it, 327.  
 its use in seventeenth century, 328.  
 restrained by Bill of Rights, 329-30.
- Disqualification :**  
 for House of Commons, 78-95.  
 how dealt with by House, 167-9.  
 for sitting and voting in House of Lords, 215-17.
- Disraeli, B.,** 307, 312.
- Dissenter :**  
 not excluded by Parliamentary oath, 93.
- Dissolution :**  
 form of, by Proclamation, 53, 72.  
 terminates existence of Parliament, 70.  
 by royal prerogative, 72, 304.  
 by efflux of time, 72.  
 formerly by demise of Crown, 73, 74.  
 prerogative of, when properly exercisable, 304-6.  
 right of ministers to claim, 306-7, 383.  
 effect of, on impeachment, 365-6.
- Distribution of Seats : see Representation.**
- Divine Right :**  
 theory of, 39.
- Duke :**  
 title of, 229.
- Duncombe, Mr. :**  
 case of, 156.
- Dwelling House :**  
 definition of, 113.

## E.

- Earl :**  
 a member of Witan, 192.  
 and of Feudal Council, 192.  
 mode of creation, 196.

- Earl :**  
 title of, 229.
- Edinburgh :**  
 place of election of Scotch peers, 219.
- Education Bill, 1908 :**  
 use of guillotine during discussion of, 267.
- Edward I :**  
 constitution of, 28.  
 his model Parliament, 49, 140.  
 creates estate of baronage, 193, 194.
- Edward II :**  
 renunciation of allegiance to, 32.  
 enactment defining legislature, 50, 242, 246.
- Edward III :**  
 changed form of writ of summons to temporal peer, 195.  
 form of Statutes in his reign, 245, 249.  
 enacted ordinances, 245.  
 levied impositions, 337.
- Edward VI :**  
 Commons' Journals begun in reign of, 251.  
 additions to Commons' House in reign of, 343.
- Elections :**  
 of ministers demanded by mediaeval Parliaments, 31.  
 Parliamentary procedure in fifteenth century, 102, 103.  
 before Ballot Act, 137-8.  
 under provisions of Ballot Act, 138-9.  
 disputed, how determined before 1868, 111, 168-71.  
 and since, 171-2.  
 of Scotch and Irish peers : *see* Peerage.
- Elector : see Franchise.**
- Eliot, Sir John :**  
 proceedings against, 159, 176.
- Elizabeth :**  
 Parliamentary boroughs created by, 34, 344.  
 interfered with freedom of speech, 158.  
 Parliamentary oath required in her reign, 63.  
 her use of proclamations, 322.  
 levied impositions, 337.
- Ellenborough, Lord :**  
 on *Burdett v. Abbott* case, 188.
- Elsynge :**  
 his treatise, 232.
- Error :**  
 proceedings in, 367, 368.

**Estate :**  
 qualification of, for Commons, 94.

**Estimates :**  
 presented to Committee of Supply,  
 273, 274.  
 supplementary, 279.

**Etton College :**  
 case of, 331.

**Evidence :**  
 of membership of either House,  
 62.  
 of claim of peerage, 218.  
 Acts to amend law of, 92.

**Examiners :**  
 of private bills, 293-5.

**Executive :**  
 in theory and practice, 4.  
 in what it consists, 3, 4.  
 control of by Parliament, 30, 41,  
 388.  
 limits of Parliamentary inter-  
 ference with, 377, 379.

**Expulsion :**  
 of member by House of Commons,  
 178.  
 not a disqualification, 178.  
 of Lord of Parliament by Lords'  
 House, 216-17.

**F.**

**Fagot votes :**  
 dealt with by Statute, 127.

**Faith :**  
 its effect in mediæval royalty, 38.  
 oath of taken by bishop elect, 223.

**Fee simple :**  
 in a dignity, 203.

**Fees :**  
 on release after commitment by  
 House of Commons, 178.

**Felony :**  
 conviction of, a disqualification  
 for seat in Commons, 87; in  
 Lords, 216; for franchise, 126.  
 not protected by privilege of Par-  
 liament, 154.

**Feudalism :**  
 its conception of royalty, 32.

**Finance Bill :**  
 begun in Committee of Ways  
 and Means, 277.

**Fine :**  
 for breach of privilege, 178.  
 cannot be suffered of a peerage,  
 199.

**First reading :**  
 of a public bill in the Commons,  
 258, 259.  
 in the Lords, 281.  
 of a private bill, 294.

**Fitzharris :**  
 case of, 365.

**Fox, O. J. :**  
 returned to Commons' House  
 during minority, 79.

**Fox, H. :**  
 Leader of House of Commons,  
 253.

**Franchise :**  
 meaning of term, 101.  
 Parliamentary franchise before  
 1832 in counties, 105, 106; in  
 boroughs, 107-12; in Scotland,  
 114; in Ireland, 115; changes  
 previous to 1884 in counties,  
 106; in boroughs, 111-14; in  
 Scotland, 114, 115; in Ireland,  
 115, 116.  
 present qualifications: property,  
 117, 118; occupation, 118, 119;  
 inhabitant householder, 113,  
 119, 120; lodger, 114, 121.  
 ancient franchises reserved, 122.  
 disqualification for exercise of,  
 123-7.  
 present uniformity of, its effect,  
 131-4.  
 right of, ascertainable by courts  
 of law, 182.  
 affected by resolutions of House  
 of Commons, 111.

**Franchise Bill :**  
 treatment of by Lords in 1884,  
 286-7.

**Freedom from arrest, 153, 154-7.**

**Freedom of Speech :**  
 privilege of, 157.  
 when first demanded, 153.  
 history of, 157-61.  
 consequent right of Commons to  
 exclude strangers, 161; and to  
 forbid publication of debates,  
 162-7.  
 how affected by law of defama-  
 tion, 165, 166.

**Freehold :**  
 a qualification for county fran-  
 chise, 105, 106.  
 and in certain towns, 117.  
 present extent of qualification,  
 116-18.

**Freeman :**  
 entitled to franchise in certain  
 towns, 108.  
 right how acquired, 109.  
 how reserved by Reform Act,  
 112.  
 extent to which it exists now,  
 122.

**Freshville peerage :**  
 case of, 199.

G.

- Garter King at Arms :  
his duties at opening of Parliament, 62.
- Gentleman Usher of Black Rod, 230.
- George I :  
his non-attendance at Cabinet, 9, 42.  
his disputed title a ground for Septennial Bill, 73.
- George III :  
interfered with free speech in Parliament, 159, 160.  
influenced Parliament by corruption of members, 159, 337, 346, 351-3, 355.
- Gladstone, W. E., 307, 378.
- Godden v. Hales :  
case of, 328, 331.
- Goodwin and Fortescue :  
case of, 169.
- Grenville Act :  
as to judging disputed returns, 171, 376.
- Grey, Lord :  
his Reform Bill of 1832, 355.
- Guillotine :  
a form of closure, 263, 264.  
its effects, 266-7, 289.

H.

- Habeas Corpus :  
return to, where commitment is by order of House of Commons, 187.
- Hakewill :  
his argument in Bate's case, 336-8.
- Hallam, H. :  
his History, 13, 195, 196.
- Hampden :  
case of, 339.
- Hare, Mr. :  
his scheme of representation, 142.
- Haxey :  
case of, 157.
- Henry II :  
taxation under, 27.
- Henry III :  
representative assemblies during his reign, 48.  
his estimate of number of Baronies, 194 n.
- Henry IV :  
his judgment in Haxey's case, 157.  
his indemnity of Lords and Commons, 269, 309.

- Henry IV :  
private bill legislation dates from his reign, 292.  
forbids appeals in Parliament, 362, 367.
- Henry V :  
and legislative procedure, 248.
- Henry VI :  
creation of baronies by, 197.  
and Viscounts, 229.  
mode of framing laws in his reign, 32, 249.  
limitation of county franchise, 105.  
charters of incorporation of towns, 110.
- Henry VII :  
barony of Berkeley settled on, 197-8, 205.  
his use of Star Chamber, 367.
- Henry VIII :  
his use of Parliamentary forms, 34, 321.  
to obtain discretionary legislative power, 325.  
his additions to representation, 130, 343.  
privileges of Commons first formally claimed in his reign, 153.  
Lords' Journals begun in reign of, 251.  
his alleged entrance into House of Commons, 310.
- Hobbes, T. :  
on purpose of government, 39.
- Holker, Sir J. :  
on the case of John Mitchel, 88.
- Holland, T. M. :  
on rights, 14.
- Holt, O. J. :  
in case of *Abbey v. White*, 182.  
in *Paty's* case, 187, 189.
- Homage :  
done by bishops for temporalities of see, 225.
- Horne Tooke, Rev. J. :  
election of, 82.
- House of Commons : *see* Commons.
- House of Lords : *see* Lords, Peer, Peerage.
- Householder :  
how far qualified for borough franchise before 1832, 107.  
by Act of 1867, 113.  
now qualified for county franchise, 121.
- Howard v. Gossett :  
case of, 152.



## I.

- Impeachment:**  
 object of, 31, 385.  
 process of, 362 et seq.
- Impositions:**  
 case of, 334-5.  
 nature of, 335-8.
- Imprisonment:**  
 by order of Commons, duration of, 179.  
 by order of Lords, 232.
- Incorporation:**  
 a qualification for franchise, 108.  
 charters of, their effect, 110.
- Indenture:**  
 evidence of election to Parliament, 61, 102.  
 of Goodwin's return, 169.
- Indictable offence:**  
 not protected by privilege of Parliament, 154.
- Indulgence:**  
 declaration of, 331.
- Infancy:**  
 a disqualification for the Commons, 78.  
 for exercise of franchise, 124.  
 for sitting in House of Lords, 215-16.
- Inhabitant occupier:**  
 nature of qualification, 112, 113.  
 distinct from occupier, 117.  
 character of residence required, 120.
- Insanity:** *see* Lunatic.
- Instructions:**  
 to Committee of House, 261.
- Ireland:**  
 Act of Union with, 7, 8, 43, 56, 129, 201, 207, 209, 221, 235.  
 Peer of: *see* Peerage.  
 Parliamentary franchise in, 115, 116, 118, 119.  
 distribution of seats in, 131-2.
- Irish Church:**  
 disestablishment of, 285.

## J.

- James I:**  
 disliked constitutional forms, 35.  
 required oath of supremacy of Commons, 63, 89.  
 his interference with elections, 169.  
 his use of proclamations, 322, 323.  
 constituencies revived by, 345.  
 creates a Court party in Parliament, 346.

## James II:

- the issues between him and his subjects, 37.  
 difficulties arising on his abdication, 75.  
 his use of dispensing power, 328, 329.  
 of suspending power, 331.
- Jews:**  
 their Parliamentary disabilities, 91, 101.
- John:**  
 his *commune concilium regni*, 47.  
 distinction between *maiores* and *minores barones* in his reign, 193.
- Journals:**  
 of House of Commons, how kept, 151.  
 — commencement of, 251.  
 doubted if matter of record, 179.  
 citations from, 65, 311, 317-18, 345.  
 of House of Lords, 218.  
 — commencement of, 251.
- Judges:**  
 of Supreme Court, why summoned to House of Lords, 51, 55, 58.  
 form of summons, 57.  
 cannot sit in House of Commons, 82.  
 try disputed returns, 171.  
 removable on address of both Houses, 378.
- Jury:**  
 freedom from serving on, a privilege of members of House of Commons, 157.  
 and of House of Lords, 231.

## K.

- Kentish petition**, 374.
- Knight of the shire:**  
 two to be chosen from each shire, 98.  
 form of writ for election of, 59.  
 mode of election, 102.

## L.

- Lake v. King:**  
 case of, 165.
- Lansdowne, Lord:**  
 on duty of Lords as to bills coming from Commons, 287.
- Laveleye, M.:**  
 on complexity of free States, 2.
- Law Courts:**  
 limitation of privileges of Parliament by, 181-9.

- Lawyer :**  
might not sit as knight of shire, 94.
- Leader of the House :**  
Henry Fox as, 252.
- Leasehold :**  
a qualification for county franchise, 106, 116, 117.
- Legislation :**  
the work of Crown in Parliament, 3, 4.  
necessary parties to, 46.  
and of Lords and Commons, 49.  
character of mediæval and modern, 51-3.  
not sole function of Parliament, 52, 240, 358.  
rights of Commons in respect of, 30, 242.  
by ordinance, 244, 250.  
by petition, 247.  
by bill, 250.  
process of public bill, 259.  
of private bill, 293.  
Standing Orders relating to, 296.  
by provisional order, 296, 297.  
by statutory rules and orders, 298, 299.  
share taken by Crown, 313-17.  
rights once claimed by Crown, 321.
- Letters missive :**  
for election of bishop, 223.
- Letters patent :**  
at opening of Parliament, 66.  
a mode of promulgating ordinances, 243.  
of appointing to bishopric, 223.
- Libel :**  
law of, in relation to debates, 165.  
or Parliamentary papers, 165-6, 183-5.
- Life Peerage :** *see* Peerage.
- Loan :**  
to King, 337, 338.  
to government, 350.
- Local bills :**  
a part of private bill legislation, 292.
- Locke, J. :**  
on purpose of government, 39.
- Locus standi :**  
to oppose a private bill, 295.
- Lodger :**  
qualification of for Parliamentary franchise, 113, 114, 116, 121, 123.  
distinguished from householder, 121, 122.  
must claim his vote annually, 125.
- London City :**  
qualification for Parliamentary franchise in, 122.  
representation of, 129.  
conflict with House of Commons in 1771, 164.
- Long Parliament :**  
its dealings with taxation, 35, 338, 341.  
with jurisdiction of Council, 35, 324.  
forbade publication of debates, 162.  
provided for frequent summons of Parliament, 302.  
on judgment in shipmoney case, 341.
- Lord Clerk Register :**  
of Scotland, at election of representative peers, 62, 219, 220.
- Lord High Steward :**  
Court of, 226, 233, 234.  
presides at impeachment of peer, 364.
- Lords, House of :** *see* Peer, Peerage :  
its origin, 48, 192-6.  
its connection with *magnum concilium*, 51.  
consequent confusion of functions, 244-5, 246, 249.  
not identical with Peerage, 190.  
its functions, 191.  
qualifications for, 191; how created, 196, 217-20, 221, 225-7.  
places of individual peers in, 229.  
officers of, 230.  
privileges of, 230-3.  
its share in legislation, 11, 268-73, 281-7.  
disqualifications for summons, 208-15; for sitting and voting, 214-17.  
oath required in, 217.  
mode of introduction to, 217, 228.  
judicial duties, 227, 233, 366-8.  
communications with Commons, 281-3.  
differences with, 282-3.  
how settled, 202, 284, 286.  
present relations with House of Commons, 288-91.  
numbers of, 236-9.  
suggestions for increased efficiency of, 237.  
influence exercised on by Crown, 354-7.
- Lords of Appeal :**  
their qualification, 227.  
character of their peerages, 227-8.

**Lords Spiritual :** *see* Bishop.  
**Lords Temporal :**  
 of whom they consist, 191-2.  
**Lunatic :**  
 incapable of election to Commons, 79.  
 or of sitting, at common law, 79 ;  
 by statute, 80.  
 or of exercising Parliamentary franchise, 126.  
**Lynch, A. A. :**  
 case of, 172.

## M.

**Mace :**  
 symbol of Speaker's office, 62, 67, 149.  
**Magna Charta :** *see* Index of Statutes.  
**Magnum Concilium :**  
 its relation to House of Lords, 47, 48.  
**Managers :**  
 in conference between Lords and Commons, 282.  
**Mandamus :**  
 to compel hearing of objectors to confirmation of bishop, 224.  
**Mandate :**  
 modern theory of, 308.  
**Marquis :**  
 title of, 229.  
**Mary :**  
 her impositions on merchandise, 337.  
 her additions to representation, 344.  
**Master of the Rolls :**  
 may not sit in Commons' House, 84.  
**May, Sir E. :**  
 on money grants, 271.  
**Medical Relief :**  
 does not disqualify for Parliamentary franchise, 126.  
**Meeting of Parliament :** *see* Parliament.  
**Melbourne, Lord :**  
 on prerogative of dissolution, 305.  
**Members :**  
 of House of Commons, writ for election of, 57, 59.  
 when summoned to bar of Lords, 62, 317.  
 evidence of election, 62.  
 oaths required of, 63, 64, 92, 100-1.  
 disqualifications of, 78-92.  
 extinct disqualifications of, 93-4.  
 cannot resign seat, 94.

**Members :**  
 wages of, 129.  
 privileges of, 145-89.  
 expulsion of, 178.  
 corruption of by Crown or its ministers, 346 et seq.  
**Memorial :**  
 of opponents of a private bill, 293.  
**Messages :**  
 from Crown to Parliament, 311-12.  
 from one House to another, 281-3.  
**Middlesex, Earl of :**  
 his impeachment and sentence, 216-17.  
**Ministers of the Crown :**  
 position of, 5.  
 attempted control of by Commons, 30.  
 how far a check on feudal king, 32-3.  
 how kept in harmony with Commons, 36-7.  
 represent dominant party, 41.  
 their joint responsibility, 42.  
 criticism of them by Parliament, 380-3.  
 their control over their supporters, 306, 382, 385.  
**Minorities :**  
 representation of, 8, 9, 134, 140-5.  
**Misdemeanour :**  
 conviction of no disqualification for Parliament, 88, 172, 173.  
**Mist :**  
 case of, 360.  
**Mitchel, John :**  
 case of, 87, 172.  
**Money bill :** *see* Bill.  
**Moravian :**  
 allowed to affirm in lieu of oath, 91, 101.  
**Motions :**  
 notice of, 257, 258, 259.  
 for returns, 257.  
 for leave of absence, 257.  
 in respect of public bills, 259.  
 of grants of public money, 271.  
 that Mr. Speaker leave the chair, 274.  
 that 'question be now put,' 263.

## N.

**Naming a Member :**  
 effect of, 262.  
**Naturalisation :**  
 its effect on political status, 80, 126.  
**Newark :**  
 enfranchised by Crown, 346.

**Nomination :**  
 of candidates for Parliamentary election, 138.

**Non obstante :**  
 meaning of term, 330.

**North, Lord :**  
 methods of corruption employed by, 350, 351-3.

**Northstead, Stewardship of :**  
 form of appointment to, 95, 96.

**Notice :**  
 of motion, 257, 258.

**O.**

**Oath :**  
 of office, 30.  
 of allegiance, 63, 89, 90.  
 of supremacy, 63, 89.  
 of abjuration, 90.  
 purport of oaths, 90.  
 Parliamentary, 63, 91.  
 required in Commons, 64, 91; in Lords, 217.  
 questions arising upon, 92, 93, 175-6, 186.  
 affirmation substituted for, 64, 93.  
 required of Irish peer before voting for representative peer, 222.  
 evidentiary, Parliamentary Committee may administer, 376.

**Obstruction :**  
 of business of the House, 10, 11, 263, 265.

**Occupation :**  
 a qualification for franchise, 104.  
 in counties, 106.  
 in boroughs, 112-16.  
 present qualification, 118-20, 123.

**Occupier :**  
 various senses of term, 117.  
 joint occupiers, 128.  
 entitled to be placed on register, 135, 136.

**Office :**  
 oath of, 30.  
 a disqualification for Commons' House by Act of Settlement, 41, 82.  
 by Act of Anne, 83-5.  
 offices which are exempted from disqualification, 86.  
 reasons for disqualification, 86, 349.  
 a means of resigning seat, 95.  
 a means of influencing members, 349.

**Old Age Pensions Act, 300.**

**Order :**  
 in Council to issue writs, 53.

**Order :**  
 form of, 54.  
 of the day in House of Commons, 258.

**Orders and Rules, Provisional, 296-300.**

**Ordinance :**  
 how different from Statute, 243-5, 321.

**Overseer :**  
 his duties in making up register, 135.

**Owner :**  
 of land, his qualification for franchise, 105, 106.

**P.**

**Palmerston, Lord : 377.**

**Pardon :**  
 removes disabilities of conviction, 87, 126.  
 not pleadable in bar of impeachment, 365.  
 prerogative of, extends to sentence after impeachment, 217, 365.

**Parke, Baron :**  
 quoted in *Howard v. Gosset*, 152.

**Parliament :**  
 sovereign powers of, 1-2, 46.  
 omnipotence of, 7, 240.  
 cannot bind its successor, 8.  
 who are summoned to, 47.  
 growth of its powers, 4, 34-40.  
 alone can make laws, 46, 243, 324.  
 or impose taxes, 280, 340, 341.  
 or grant supplies, 278, 279, 303.  
 its duties other than legislative, 46, 358.  
 Simon de Montfort's Parliament, 49.  
 the Model Parliament, 49, 128.  
 an assemblage of estates, 49.  
 objects of summons, 51, 247.  
 prorogation of, 70, 72.  
 meeting of, 45.  
 opening of, 61-5.  
 King summons, 4, 47, 51 et seq., 301.  
 prorogues, 71, 72.  
 dissolves, 72, 304.  
 how affected by demise of Crown, 73, 74.  
 regularity of summons how secured, 302, 322.  
 regularity of session how secured, 302-4.  
 management of by ministers, 349 et seq.

**Parliamentary Elections Act, 168, 171.**

- Parnell, C. S. :**  
obstruction organized by, 10.
- Parochial Relief :**  
may disqualify for exercise of franchise, 126.
- Party Government :**  
system of, 5, 385.
- Patent :**  
peerage created by, 196-7, 212.  
devolution of dignity conferred by, 202, 207.  
explanatory of writ, 212.  
of new peer, read and entered on journals, 217-18.
- Patteson, J. :**  
on case of *Stockdale v. Hansard*, 183.
- Payment of members :**  
a common law liability of constituencies, 129.
- Peer of Parliament :**  
of United Kingdom, 51; how summoned, 55.  
how created, 217.  
of Scotland, representative, 58, 62, 75, 201, 208, 209, 219, 221.  
of Ireland, representative, 55, 58, 75, 209, 221, 222.  
trial of, 233.
- Spiritual, how created, 222, 223.**  
number of, 210, 227.  
when entitled to summons, 210, 227.  
whether ennobled in blood, 225-6.  
form of summons, 54, 226.  
power of resignation, 227.  
as Lord of Appeal, 227.
- Peerage : see Lords, House of :**  
law relating to, rests on custom, 75, 198.  
a disqualification for House of Commons, 81, 168.  
and for franchise, 124.  
exceptions in case of Irish peers, 81, 124.  
functions of, 191.  
ranks of, 196-7.  
additions to, how limited by Acts of Union, 200-1.  
cannot be surrendered, 201.  
by rules of devolution, 202, 203.  
for life, rules as to, 200, 212, 213, 214.  
alienation of, 197, 199, 206, 207.  
descendibility of, 200, 210.  
claims of, how made, 217-18, 235;  
by whom adjudicated on, 234.
- Pelham, H. :**  
House of Commons 'managed' by, 348.  
Walpole's advice to, 351.
- Pension :**  
a disqualification for seat, 87.  
secret pensions a form of corruption, 352.
- Petition :**  
a preliminary to legislation, 247-8.  
public petitions, 256.  
as mode of introducing private bills, 291, 293.  
receivers and triers of, 292, 370 n.  
right of subject to make, 332.  
legislation concerning, 372.  
history of, 369-73.  
modern rules respecting, 373.
- Petition of Right, 35, 316, 338, 339.**
- Pitt, W. : 348.**  
peers created by, 353.
- Plural vote, 141.**
- Poll :**  
at Parliamentary election, 102, 198, 199.  
in Universities, 139.
- Powell, J. :**  
on the Seven Bishops' case, 332.
- Praemunientes clause :**  
form of, in bishop's writ, 49.  
instance of, 157, n. 2.
- Precedence :**  
of Speaker, 148.  
of peers, 229.
- Precept :**  
issued by sheriff to boroughs, 60, 102.  
by clerk of the peace to overseer, 134-5.
- Prerogative : see Crown.**
- Prime Minister :**  
how chosen, 5.
- Prittlewell :**  
petition from, 375.
- Private bill : see Bill.**
- Privilege :**  
of Commons, 145-89.  
demanded by Speaker, 62, 68, 146, 152.  
is matter of common law, 76, 145.  
collision with courts of law respecting, 145, 146, 179-89.  
mode of enforcement, 146, 151, 177.  
of Lords, 230-9.
- Privy Council :**  
as represented in Star Chamber, 35, 356.  
as constituted by Sir W. Temple, 37.  
its relations to Cabinet, 40-2.  
its interference with elections, 344.

**Procedure :**  
 rules of, importance of, 9, 10.  
 of House of Commons, regulation  
 by House, 174-6.  
 in legislation, antiquities of, 241-  
 51.  
 commencement of modern, 251-4.  
**Proclamations :**  
 use of to dissolve and summon  
 Parliament, 53, 71, 72.  
 form of, 53-4.  
 to prorogue Parliament, 70 ; form  
 of, 72.  
 a mode of legislation by Crown,  
 245, 322, 323.  
 Statute of, 321, 322.  
 case of, 323.  
 legal and illegal, 324-5.  
**Property :**  
 qualification for election to Com-  
 mons' House, 94.  
 for franchise before 1884, 102-3 ;  
 in Scotland, 114-15 ; in Ireland,  
 115-16.  
 present qualifications in right of,  
 117, 118, 123.  
**Prorogation :**  
 its effect on business of Houses,  
 70.  
 on impeachment, 365.  
 on imprisonment, by order of  
 House of Commons, 179.  
 form of, 72.  
**Protest :**  
 record of in House of Lords, 232.  
**Provisional Orders and Rules,**  
 296-300.  
**Proxy :**  
 voting by in House of Lords, 232.  
**Public Bill :** *see* Bill.  
**Public Business :** *see* House of  
 Commons.  
**Purbeck peerage :**  
 case of, 199.

Q.

**Quaker :**  
 allowed to affirm in lieu of taking  
 oath, 64, 91, 94, 101.  
**Question :**  
 in House of Commons, 255, 263,  
 381.  
**Quia Emptores :**  
 Statute of, 29.

R.

**Rate :**  
 payment of, in connection with  
 franchise, 112, 113, 114, 119, 120.  
 with making up register, 135.

ANSON PARLIAMENT

**Rate :**  
 Poor Rate and Assessment and  
 Collection Act, 1869, 114, 121.  
**Receivers :**  
 of petitions, 292, 370 n.  
**Record :**  
 Court of, whether House of Com-  
 mons is such, 179, 180.  
 matter of, title of peer must  
 originate in, 199.  
**Redistribution Act, 1885 :**  
 effect of, 131, 132, 133.  
**Reform Bill, 1832 :**  
 its effect on county franchise, 106 ;  
 on borough franchise, 112.  
 on distribution of seats, 131.  
 opposition of Lords to, 355.  
**Reformation, the :**  
 political effect of, 33.  
**Regency Bill, 314.**  
**Registration :**  
 necessity for, 134 ; process of,  
 135-7 ; conclusiveness of, 136-7.  
 Act of 1878, 113, 114, 121 ; of 1885,  
 134.  
**Report :**  
 stage of in public bill, 261.  
**Reporting :**  
 of debates, 162-7.  
**Representation :**  
 began before Magna Charta, 48.  
 early instances of, 48, 129.  
 of England, Scotland, and Ire-  
 land respectively, 131.  
 of minorities, 140-5.  
 of Universities, 141.  
 Mr. Hare's scheme of, 142.  
 proportional representation, 143.  
**Representation of the People**  
**Acts, 1867, 1884.** *See* Statute.  
**Reprimand :**  
 a form of punishment by Com-  
 mons, 177.  
**Residence :**  
 in constituency, a qualification  
 for membership of Commons,  
 94, 344.  
 for franchise, 102, 104, 105.  
 in counties, 121, 123 ; in towns,  
 108, 109, 120.  
 differs from occupation, 117, 120.  
**Resolution of House of Commons :**  
 effect on disability arising from  
 conviction, 87.  
 on the franchise, 108.  
 on procedure, 175, 176.  
 inoperative against rules of law,  
 172, 175, 176, 183, 183-7.  
**Restoration, the :**  
 relations of Crown and Parlia-  
 ment at, 36.

D d

**Returning officer :**  
 writs issued to, 57, 103.  
 how far disqualified for franchise,  
 125.  
 when he may reject votes, 137.  
 his duties at an election, 138-9.

**Revenue of Crown :**  
 hereditary, 30.  
 ordinary and extraordinary, 36-7.  
 sources of, 334.  
 how granted, 276-7.

**Revising Barrister :**  
 adjudicates upon disputed claims,  
 136.

**Richard II :**  
 resigns right to allegiance, 32.  
 his grants of dispensation, 326.

**Rockingham, Lord, 348, 353.**

**Roman Catholics :**  
 disabilities of, 90, 101, 116.

**Rosebery, Lord, 306.**

**Rossa, O'Donovan :**  
 case of, 172.

**Russell, Lord J. :**  
 sat in Parliament as an infant,  
 79.  
 his Franchise Bill of 1854, 141.  
 and Queen Victoria, on prerogative  
 of dissolution, 305.

**Ruthyn peerage :**  
 case of, 199.

## S.

**Saladin Tithe :**  
 collection of under Henry II, 27.

**Salisbury, Lord : 307.**  
 speech on the Irish Church Bill,  
 285, 289.

**Scot and lot :**  
 qualification for borough fran-  
 chise, 108.

**Scotland :**  
 Act of Union with, 7, 8, 43, 129,  
 200, 209, 219.  
 representative peers of, 58, 62,  
 75, 201, 209, 219-21.  
 Parliamentary franchise in, 114,  
 118, 119.  
 representation of in Commons,  
 129, 131, 132.

**Secretaries of State :**  
 not more than four Principal and  
 four Under-Secretaries may sit  
 in House at one time, 85.

**Selborne, Earl of :**  
 his seat vacated by succession to  
 peerage, 81, 199.

**Septennial Act :**  
 effect of, 73.  
 reasons for passing, 73.

**Serjeant-at-Arms :**  
 of Commons, appointment and  
 duties of, 151, 254, 257.  
 of Lords, the attendant of the  
 Chancellor, 230.

**Session : see Parliament.**

**Sessional Order :**  
 nature of, 296.

**Seven Bishops :**  
 case of, 332.

**Sex :**  
 a disqualification for Parlia-  
 mentary franchise, 123.

**Sheriff :**  
 writs addressed to, 47, 49, 57,  
 59.  
 his duties at mediæval elections,  
 51, 102, 103.  
 as to returns, 137-9, 168.  
 disabilities of, 82.  
 attempts to influence, 344.

**Shipmoney :**  
 case of, 339-40.

**Shire : see County.**

**Shirley, Sir Thomas :**  
 case of, 155.

**Sign-manual :**  
 pardon under, 88.  
 message under, 311.

**Simon de Montfort :**  
 Parliament of, 49.

**Skinner :**  
 case of, 359-60.

**Sovereignty :**  
 Austinian theory of, 1, 18.  
 of Parliament, 2, 46, 240, 319.  
 divergence in theory and practice  
 of, 4, 14.

**Speaker :**  
 of House of Commons, his elec-  
 tion, 62, 66, 76, 148.  
 his approval by Crown, 62, 76.  
 his duties, 62, 149, 162, 254, 259-  
 68; in communication with  
 Crown, 67, 68, 147, 311.  
 demands privileges of Commons,  
 62, 67, 152.  
 right of Commons to choose their  
 own, 148.  
 issues warrant for new writ, 149,  
 168.  
 his precedence, 148; his deputy,  
 150; his counsel, 295.  
 his continuity of office, 150.  
 assault upon, 159, 176.  
 motion that he 'leave the chair,'  
 161, 265, 274.  
 formerly a nominee and minister  
 of Crown, 252.  
 his place in the House of Com-  
 mons, 254, 255.

- Speaker :**  
of House of Lords, 230.
- Speech from the Throne :**  
declares cause of summons, 65.  
does not limit topics of discussion, 65, 68, 77.  
not a legal necessity, 76.  
a mode of communication between Crown and Parliament, 309.
- Spiritualities :**  
guardian of, 226.
- Standing Order :**  
as to daily business of House, 9, 261, 296.  
as to obstruction, 263.  
as to bills concerning religion and trade, and law, 256-7.  
as to money bills, 271, 272.  
as to private bills, 293, 294, 296.
- Staple :**  
ordinance of, 245.
- Star Chamber :**  
its judicial powers, 35, 367.  
its use and abuse, 367.  
enforces proclamations, 323, 324.
- State, the :**  
gradual growth of, 15-17.  
complexity of modern, 21-2.
- Statute.** See Index of, at p. xxlii.
- Stephen, J. :**  
on right of Parliament to regulate its own internal procedure, 175, 177.  
in case of *Bradlaugh v. Gosset*, 186.
- Stewart, Mr. :**  
case of, 80.
- St. John :**  
counsel for Hampden in case of shipmoney, 340.
- Stockdale v. Hansard :**  
case of, 166, 183, 185.
- Strangers :**  
presence of, in House, 161, 162.
- Stroke :**  
case of, 157, 159.
- Stubbs, W. :**  
his *Constitutional History* cited, 13, 26, 49, 192, 195, 196, 213, 214, 243, 246, 268, 322, 334.
- Subsidy :**  
its expenditure, how controlled, 30.  
separately granted by clergy and laity, 50.
- Summons :** see Parliament, Writ.
- Supply :**  
committee of, 273-6.  
appropriation of, 303, 382.
- Supremacy :**  
oath of, 63, 89, 100.  
suspending power, 331-3.
- T.**
- Taxation :**  
mode of, 50, 334.  
claim of Crown to levy, 333 et seq.
- Temple, Earl, 355.**
- Temple, Sir W. :**  
his Privy Council scheme, 37.
- Tenants in Chief :**  
alone represented in Common Council of the Charter, 47, 193.
- Tenure :**  
barony by, 205-8.  
ancient qualification for franchise, 107, 108.
- Thomas v. Sorrell :**  
case of, 327.
- Tonnage and Poundage :**  
when granted annually, 335, 338.  
provision for coast defence, 339.
- Trade :**  
bills relating to, 256.  
King's prerogative relating to, 334.
- Treason :**  
conviction of, creates disabilities, 87, 216.
- Treasury :**  
work of in connection with supply, 275.  
regulations by for administration of Old Age Pensions Act, 300.
- Triennial Act :**  
reasons for passing, 73.  
repeal of, 302.
- Triers :**  
of petitions, 292, 370.
- U.**
- Undertakers :**  
a court party in Parliament, 346.
- Union :**  
Acts of : see Statute.
- Universities :**  
representation of, 133.  
qualification for franchise, 122, 123.  
mode of voting, 139.  
Commissioners' Statutes for, 299.
- Urgency, 256, 263.**
- Utrecht, Peace of :**  
peers created to secure approval of in Lords, 356.
- V.**
- Vacating of seats :**  
Report of Committee on, 84, 95, 218.



**Vacating of seats :**  
 offices which do not require seats to be vacated, 85, 86.

**Vaughan, O. J. :**  
 on Dispensation, in *Thomas v. Sorrell*, 327.

**Veto :**  
 on legislation, exercisable by Crown, 4, 22, 315.

**Vicar-General :**  
 his duties at confirmation of bishop, 225.

**Victoria, Queen :**  
 and prerogative of dissolution, 305, 306.

**Viscount :**  
 title of, 229.

**W.**

**Wages :**  
 of members, 129.

**Walpole, Horace :**  
 Letters of, 170.

**Walpole, Sir R. :**  
 his views on report of debates, 163.  
 his mode of keeping party discipline, 159, 160, 347, 348, 351.  
 his correspondence with Henry Pelham, 348, 351.

**War :**  
 declared by King on advice of ministers, 8.  
 Secretary of State for, 8.

**Wason v. Walter :**  
 case of, 167.

**Ways and Means :**  
 committee of, 276, 277.  
 chairman of, 149.  
 his duties, as chairman, 149, 276.  
 as deputy Speaker, 150.

**Wellesley, Mr. Long :**  
 case of, 154.

**Wensleydale peerage :**  
 case of, 212-13, 234.

**Wilkes, J. :**  
 case of, 154, 173.

**William III :**  
 his dislike of large councils, 41.  
 his use of the veto, 73, 315-16.  
 his summons of Convention, 74, 75.  
 Act for triennial summons of Parliament passed in reign of, 303.  
 uses prerogative of dissolution, 304-5.

**William IV :**  
 used personal influence in Lords, 357.  
 contemplates creation of peers to secure passing of Reform Act, 356, 357.

**Witan :**  
 the Anglo-Saxon, 26, 192, 225.

**Witness :**  
 member of House of Commons need not attend as, 156-7.  
 in case of private bills, 292, 295.  
 oath administered to by Parliamentary Committee, 376.

**Women :**  
 cannot exercise franchise, 124.  
 in ladies' gallery, 162.

**Writ :**  
 of summons to Commune Concilium, 47, 49, 189.  
 to Parliament, order in Council to issue, 54.  
 to whom issued, 55.  
 how delivered, 59.  
 when returnable, 55.  
 where returnable, 61, 168.  
 forms of, to temporal peer, 55.  
 to spiritual peer, 56, 58, 225.  
 to judge of High Court, 57.  
 to returning officer, 56, 57.  
 effect of demise of Crown upon, 73, 74.  
 creation of barony by, 195-6, 199.  
 devolution of dignity so conferred, 204.  
 of new peer entered on journals, 217-18.  
 how applied for, 218.

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